Supreme Court, U.S.
FILED

No. 94-32 JUL - 5 1994

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1994

ALLSTATE INSURANCE COMPANY,
Petitioner,

v.

FRANK S. DEUS and
VOORHIES & LABBÉ,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THIS COURT'S DECISION IN *CHICK KAM CHOO v. EXXON CORP.*, 486 U.S. 140 (1988), ELIMINATED OR CURTAILED THE *RES JUDICATA* COMPONENT OF THE RELITIGATION EXCEPTION TO THE ANTI-INJUNCTION ACT, 28 U.S.C. § 2283, SO AS TO DEPRIVE FEDERAL DISTRICT COURTS OF THE POWER TO ENJOIN FURTHER STATE COURT LITIGATION OF CLAIMS WHICH WERE PRESENTED TO THE FEDERAL COURT IN AN UNTIMELY OR OTHERWISE INADEQUATE FASHION.

II. WHETHER THE FIFTH CIRCUIT'S REFUSAL TO UPHOLD THE DISTRICT COURT'S INJUNCTION AGAINST FURTHER LITIGATION OF PLAINTIFF'S FRAUD CLAIMS ERRONEOUSLY FAILED TO GIVE THE COLLATERAL ESTOPPEL EFFECT TO THE DISTRICT COURT'S JUDGMENTS WHICH IS MANDATED BY *CHICK KAM CHOO v. EXXON CORP.*, 486 U.S. 140 (1988).

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceeding below were the petitioner, Allstate Insurance Company and the respondents, Frank S. Deus and the Law Firm of Voorhies & Labbé. The National Neighborhood Office Agents Club, Inc. (NNOAC) was a separate appellant in the court below on the issue of its intervention; since that issue is not addressed in this petition the NNOAC is not named as a party herein.

Petitioner, Allstate Insurance Company, certifies under Rule 29.1 that Allstate Insurance Company is a wholly-owned subsidiary of The Allstate Corporation, a Delaware corporation. Allstate Holdings, Inc., a Delaware corporation, owns 80.1% of the outstanding common stock of The Allstate Corporation, and the remaining 19.9% of such stock is publicly held. Allstate Holdings, Inc. is a wholly-owned subsidiary of Sears, Roebuck and Co. The non-wholly-owned operating subsidiaries of Allstate Insurance Company are Allstate Automobile & Fire Insurance Company, Limited; Saison Life Insurance Company, Ltd.; Samshin Allstate Life Insurance Company, Ltd; and Tramed (a Russian business entity).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Allstate Insurance Company respectfully asks this Court to grant certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this civil proceeding on March 8, 1994.

OPINIONS BELOW

The opinion for the Court of Appeals for the Fifth Circuit is reported at 15 F.3d 506 and is reprinted in the Appendix at p. 1a. The April 5, 1994 order denying various petitions for rehearing is reprinted in the Appendix at p. 71a.

The September 2, 1992 order of the United States District Court for the Western District of Louisiana granting

a defense motion for an injunction filed pursuant to the relitigation exception to the anti-injunction was not reported. It is reprinted in the Appendix at p. 68a.

The opinion of the United States District Court for the Western District of Louisiana (Nauman S. Scott, D.J.) granting a defense motion for judgment as a matter of law on the claim for intentional infliction of emotional distress is reported at 800 F. Supp. 420, and is reprinted in the Appendix at p. 49a. The judgment itself is reprinted in the Appendix at p. 48a.

The April 30, 1992 ruling of the United States District Court for the Western District of Louisiana (Nauman S. Scott) granting a defense motion for a Rule 50(a) judgment as a matter of law on the claim for breach of contract has not been reported. It is reprinted in the Appendix at p. 40a.

The February 11, 1992 memorandum ruling granting a defense motion for summary judgment on claims for abuse of rights, worker's compensation benefits, negligent infliction of emotional distress and negligent misrepresentation has not been reported. It is reprinted in the Appendix at p. 37a.

JURISDICTION

The United States District Court for the Western District of Louisiana exercised jurisdiction over Deus' suit pursuant to 28 U.S.C. § 1332, based on diversity of citizenship. Respondents timely appealed various adverse judgments and the district court's injunction against the state court suit as of right to the Fifth Circuit pursuant to 28 U.S.C. § 1291.

The Fifth Circuit entered judgment on the consolidated appeals of respondents on March 8, 1994. All parties filed petitions for rehearing which were denied on April 5, 1994.

Petitioner now invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1), by filing this petition

within the ninety (90) day time period provided by 28 U.S.C. § 2101(c) and this Court's Rule 13.1.

STATUTES INVOLVED

28 U.S.C. § 1651(a):

> § 1651. Writs
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

and 28 U.S.C. § 2283:

> § 2283. Stay of State Court Proceedings
>
> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

are implicated in this case.

STATEMENT OF THE CASE

On August 15, 1988, Frank Deus (Deus), a Louisiana citizen, filed suit against Allstate Insurance Company (Allstate), (a citizen of Illinois), in the U.S. District Court for the Western District of Louisiana invoking diversity jurisdiction under 28 U.S.C. § 1332. On the same day, he filed a substantively identical suit against Allstate in the Fifteenth Judicial District Court, Parish of Lafayette, State of Louisiana. (Appendix, p. 6a) The suits arose from Deus' dissatisfaction with Allstate's implementation, in 1985, of a new approach to marketing embodied in its Neighborhood Office Agent (NOA) Program. Though participation in the new program was optional, Deus claimed that Allstate pressured agents into entering the program. Deus contended that as a result of his resistance to the new program, he was unfairly dis-

ciplined. Deus became progressively depressed, "left work and never returned," he claimed, as a result of Allstate's unfair treatment. Unable to resume his position after two years on disability leave, Deus retired. Both suits alleged intentional infliction of emotional distress, abuse of rights, defamation, breach of contract, negligent infliction of emotional distress, and sought benefits under the Louisiana Worker's Compensation Law. Deus did not serve the state court petition but instead proceeded to litigate his claims in federal court. (Appendix, pp. 6a-7a).

On January 9, 1992, three and one half years after litigation was commenced, four weeks after defendant's motion for summary judgment had been filed in accordance with the district court's deadline and three months prior to trial, Deus moved to file a third supplemental and amending complaint (Appendix, p. 72a). His motion to amend was denied. In that amendment, Deus sought to add fraud claims based on the same factual predicates as his other claims.

On March 24, 1992, two weeks prior to the trial of the federal suit, Deus served both his original state court petition and an amended and supplemental state court petition (Appendix, p. 76a) containing the identical fraud claims which he had attempted to add to the federal suit. The amended state court petition also added two individual defendants who had been his managers at Allstate.

The federal district court subsequently granted summary judgment in favor of Allstate on several of Deus' claims, and the remainder were resolved in Allstate's favor at trial pursuant to defense judgments on a F.R.C.P., Rule 50(a), Motion (Appendix, p. 37a). Deus appealed the district court's resolution of several of the claims which had been decided against him on the merits, but he did not appeal the district court's refusal to entertain his untimely fraud claims.

While Deus' federal appeal was pending, Allstate returned to federal district court and obtained an injunc-

tion against the state court proceedings as to all Defendants on all claims (Appendix Document G, p. 68a). The district court's decision to enjoin the state court proceedings was thereafter made part of Deus' appeal to the Fifth Circuit.

The appeals court affirmed the district court's injunction against Deus' state court case to the extent it was directed at claims which had been actually decided on the merits during the federal litigation.[1] However, the court overturned the district court's injunction against Deus' fraud claims, concluding that this Court's decision in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), limited the federal court's power to enjoin subsequent state court litigation to only those issues actually decided by the federal court (Appendix, p. 33a). Allstate's petition for rehearing on that issue was denied on April 5, 1994.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT, IN ALLOWING FEDERAL INJUNCTIONS TO REACH CLAIMS NEVER ASSERTED BUT NOT TO REACH INADEQUATELY PRESENTED CLAIMS, ADDS A THIRD CONFLICTING APPROACH TO THE ALREADY INCONSISTENT DECISIONS OF THE CIRCUIT COURTS OF APPEALS AS TO WHAT EXTENT *RES JUDICATA*, AS A COMPONENT OF THE RELITIGATION EXCEPTION TO THE ANTI-INJUNCTION ACT, SURVIVED THIS COURT'S DECISION IN *CHICK KAM CHOO*.

The relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, authorizes federal district courts to enjoin state court litigation to the extent necessary to "protect or effectuate" federal judgments. In *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), this Court

[1] The Court of Appeals also affirmed the district court's judgment in favor of Allstate on all claims which were decided on the merits during the federal litigation.

acknowledged that the relitigation exception is "founded in the well-recognized concepts of res judicata and collateral estoppel," but it also stated *in dicta* that the relitigation exception is limited to claims or issues which "actually have been decided by the federal court." *Id.* at 148.[2] While collateral estoppel encompasses only issues of fact or law which have actually been decided *res judicata* also reaches claims or issues which could have been but were not raised, in the earlier litigation. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980).

The apparent paradox created by the Court's recognition of the *res judicata* component of the relitigation exception and its simultaneous statement limiting the relitigation exception to claims or issues which "actually have been decided" has confounded the federal courts of appeals for the past several years. On one hand, some appeals courts have concluded that *Chick Kam Choo* severely restricted or eliminated the *res judicata* component of the relitigation exception by purporting to permit injunctions against only those issues which have actually been decided by the federal court. *See, LCS Serv. v. Hamrick*, 925 F.2d 745, 749-50 (4th Cir. 1991) (scope of § 2283 is less than res judicata); *American Town Center v. Hall 83 Associates*, 912 F.2d 104, 112 n.2 (6th Cir. 1990); *Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 642-44 (2d Cir. 1989).

On the other hand, the Ninth Circuit Court of Appeals more recently adopted the approach advocated by Wright, Miller and Cooper, and held that the *res judicata* component of the relitigation exception was not diminished by *Chick Kam Choo*. *Western Systems, Inc. v. Ulloa*, 958

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[2] Two years earlier, the Court was asked, but found it unnecessary to decide, whether Congress intended the relitigation exception to incorporate principles of *res judicata* as well as collateral estoppel. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 526 n.4 (1986), *cert. denied*, 484 U.S. 1060 (1988).

F.2d 864, 870-71 (9th Cir. 1992), *cert. denied*, ——— U.S. ———, 113 S.Ct. 970 (1993), *citing* 17 C.P. Wright, A. Miller & E. Cooper, *Federal Practice and Procedures*, § 4226, at 48 n.12 pt. 1 (1991 Supp.). In doing so, the *Western Systems* court pointed out that "[i]f the effects of a judgment are to be enforced by injunction, claim preclusion is often as good a candidate as is issue preclusion" and it criticized those circuit courts of appeal which had read *Chick Kam Choo* to compel a contrary conclusion. *Western Systems*, 958 F.2d at 870-71.

In the instant case, the Fifth Circuit added yet another twist, and one which perhaps evinces the most confusion of all. Initially, the court of appeals acknowledged that principles of *res judicata*, as reflected in the relitigation exception, would have permitted an injunction against further litigation of any claims which Deus could have raised, but had failed to raise, in the federal litigation (Appendix, p. 33a). That acknowledgement is in conflict with those courts of appeals which have read *Chick Kam Choo* as limiting the relitigation exception to only those claims or issues which were actually decided in the federal litigation.

However, the lower court then reversed ground and held that the district court improperly enjoined Deus from proceeding in state court on fraud claims which he had attempted to assert in federal court, but which were not decided on the merits because they were untimely (Appendix, p. 33a). The court of appeals did not disagree with the district court's conclusion that Deus' fraud claims, which were filed three and one-half years after the litigation had commenced and one month after Allstate had moved for summary judgment, were untimely.[3] Nonetheless, the appeals court felt constrained to overturn the injunction in part, because of *Chick Kam Choo's* use of

[3] Deus did not challenge the district court's treatment of his motion to amend. The denial of the motion to amend was not appealed.

the phrase "actually have been decided" in defining the scope of the relitigation exception. As such, the lower court's refusal to permit an injunction against further litigation of Deus' untimely fraud claims severely curtailed the *res judicata* component of the relitigation exception,[4] and is in direct conflict with the Ninth Circuit's decision in *Western Systems*, 958 F.2d 864.

As discussed below, the clear split in the circuits on the proper scope of the relitigation exception presents an issue of national importance concerning the scope of federal judicial power to enjoin state court proceedings in order to protect and effectuate federal judgments. The Court should, therefore, exercise its resources in favor of granting certiorari in order to resolve the conflict.

II. THE FIFTH CIRCUIT'S DECISION TO OVERTURN THE INJUNCTION (1) MISAPPLIES *CHICK KAM CHOO*; (2) ERRONEOUSLY ELIMINATES OR DIMINISHES THE *RES JUDICATA* COMPONENT OF THE RELITIGATION EXCEPTION; AND (3) ENCOURAGES MANIPULATION OF OUR DUAL SYSTEM OF FEDERAL AND STATE COURTS

A. Misapplication of *Chick Kam Choo*

In overturning the district court's injunction against Deus' fraud claims, the court of appeals relied solely on a statement in *Chick Kam Choo* which purported to limit the relitigation exception to claims or issues which "actually have been decided by the federal court" (Appendix, pp. 32a-33a, *citing*, *Chick Kam Choo*, 486 U.S. at 148). In essence, the appeals court thus cancelled the operation of the *res judicata* component of the relitigation exception as applied against claims which were inadequately pre-

[4] Deus' fraud claims clearly would have been barred had the court of appeals given principles of *res judicata* their full effect in the context of applying the relitigation exception. *See Poe v. John Deere Co.*, 695 F.2d 1103 (8th Cir. 1982) (applying federal principles of *res judicata* in an almost identical factual scenario independent of the Anti-Injunction Act).

sented in the earlier litigation. Without explanation, the Fifth Circuit then retreated from its own reading of *Chick Kam Choo*, and acknowledged that an injunction would have been appropriate under principles of *res judicata* had Deus never attempted to raise the fraud claims in federal court (Appendix, p. 33a).

The lower court's compromise reasoning manifests an attempt to reconcile *Chick Kam Choo's* limiting language on the scope of the relitigation exception, with its acknowledgement, in the same breath, that the relitigation exception is founded in the well-recognized principles of *res judicata* and collateral estoppel. *See Chick Kam Choo*, 486 U.S. at 147-48. However, the court of appeals' compromise finds no support in either precedent or logic. If *Chick Kam Choo* limits the relitigation exception's scope to only those issues which a federal court "actually decided," then a federal injunction would be equally as impermissible against claims which never were asserted in the federal litigation as it would be against those claims which were inadequately presented. If, on the other hand, the Court's limiting language in *Chick Kam Choo* was not intended to curtail the power of the federal court to deter claim-splitting through the *res judicata* component of the relitigation exception, then federal injunctions remain appropriate, regardless of whether the claims sought to be barred were inadequately presented, or not presented at all during the prior litigation.

Only the latter reading retaining the full *res judicata* component survives closer scrutiny of *Chick Kam Choo* in light of the purposes of the relitigation exception. In *Chick Kam Choo*, the federal district court for the Southern District of Texas was presented with claims under the statutory and maritime laws of the United States. The district court determined that the law of Singapore, as opposed to federal law applied and then dismissed the case on the basis that the federal district court was a *forum non conveniens*. Plaintiff thereafter filed suit in Texas state court, predicated upon the same operative facts as

those contained in the earlier federal suit, alleging various claims based on Texas law. The district court enjoined the state court litigation pursuant to the relitigation exception to the Anti-Injunction Act. This Court overturned the injunction to the extent it precluded litigation of plaintiff's claims under Singapore law in the Texas state court. This Court affirmed the injunction precluding relitigation of the choice of law issues.

Because the defendant had not contended during the original federal lawsuit, and the federal court had not "actually decided," whether the Texas state court was an appropriate forum, this Court overturned an injunction which, if allowed to stand, would have given the defendant the benefit of a defense it had never raised during the federal litigation. Moreover, this Court acknowledged that federal forum *non conveniens* principles could not have been applied to determine whether Texas courts might be an appropriate forum. *Chick Kam Choo* at 148. Therefore that issue could *not* have been decided in the earlier federal court proceedings. See also, *Western Systems*, 958 F.2d at 869, n.9. In preventing the defendant from abusing the relitigation exception in that manner, this Court never suggested or implied that principles of *res judicata* should be given less than their full effect in the context of the relitigation exception. Indeed, *Chick Kam Choo* did not even involve an issue of claim-splitting.

In the present context, by contrast, it is the plaintiff, Frank Deus, who withheld his fraud claims from the federal court for over three and one-half years, and then attempted to split his cause of action by pursuing those claims in state court following his defeat on the merits in the federal litigation. In further derogation of principles disfavoring claim-splitting, Deus did not even appeal the district court's denial of his motion to amend, but instead, sought to utilize the district court's refusal to entertain his fraud claims as a springboard to state court assertion of those claims.

Under traditional principles of *res judicata*, Deus' dilatory tactics in federal court clearly would have prevented him from pursuing his fraud claims in a separate forum. *See Poe v. John Deere*, 695 F.2d 1103 (8th Cir. 1982). Deus' fraud claims unquestionably arose out of the same "core of operative facts" as his other claims which were litigated to a final decision on the merits at the federal trial. *See Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986). The court of appeals acknowledged as much in conceding that principles of *res judicata* would have barred Deus' fraud claims had he never attempted to assert them in federal court (App. A, p. 33a).

Because Deus did attempt to assert his fraud claims, though unsuccessfully, principles of *res judicata* would normally have applied, so long as Deus was provided a full and fair opportunity to litigate those claims in federal court. *See Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 480-85 *rehearing denied*, 458 U.S. 1133 (1982). It was in interpreting what constitutes a "full and fair opportunity" to litigate a claim that the court of appeals was misled by *Chick Kam Choo*. In concluding that the Court's use of the phrase "actually have been decided" prohibited the lower court's injunction, the court of appeals, in essence, transformed Deus' "opportunity to litigate" his claims into an unalterable entitlement to litigate all claims, even those which are untimely, inartfully or otherwise insufficiently presented to warrant submission to the trier of fact.

Chick Kam Choo, however, did not address, let alone narrow, the concept of what constitutes a "full and fair opportunity" to litigate a claim. The opportunity which is contemplated is not equivalent to an entitlement to a decision on the merits of every claim, regardless of how or when that claim was asserted. *See Kremer*, 456 U.S. at 482 (court's procedures need only satisfy minimum requirements of due process). Due process requires only an "opportunity to be heard at a meaningful time and in

a meaningful manner, [federal citations omitted] [but] it does not require, as the doctrine of *res judicata* itself demonstrates, that the opportunity be afforded at the time and in the manner of one's own choosing." *Krison v. Nehls*, 767 F.2d 344, 349 (7th Cir. 1985). So long as the court would have entertained a claim which was raised "in conformity with [the court's] procedure," the requirement of a full and fair opportunity is satisfied. *Id.* Accordingly, it is clear that Deus, in delaying the assertion of his fraud claims for more than three and one-half years after the federal litigation was instituted, and a full month after the filing of dispositive motions, and only three months prior to trial was not deprived of a full and fair opportunity to litigate those claims.

It is apparent that those courts which view *Chick Kam Choo* as eliminating some or all of the *res judicata* component of the relitigation exception have read that decision far too broadly and out of context. As stated by the Ninth Circuit in *Western Systems*, "[i]f the effects of a judgment are to be enforced by injunction, claim preclusion is often as good a candidate as is issue preclusion." 958 F.2d at 871. Though not expressly discussed in *Western Systems*, there are several practical reasons grounded in principles disfavoring claims-splitting supportive of the Ninth Circuit's conclusion.

B. Practical Pitfalls

While permitting federal injunctions against claims which were either withheld from or decided on the merits by the federal courts, the lower court would prohibit injunctions against further litigation of claims which were untimely, inartfully or otherwise improperly presented to the federal court. As such, the court of appeals' approach rewards dilatory tactics while it simultaneously defeats principles favoring finality of judgments, which form the basis for the relitigation exception. Moreover, in permitting future state court litigation on claims which were inextricably entwined with claims which have already been

adjudicated in federal litigation, the court of appeals' approach deprives the federal district courts of the power and flexibility needed to prevent manipulation of our dual system of federal and state courts, and it exposes victorious defendants to the costs and risks of additional litigation of disputes which should be resolved in a single forum. *See Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. 281, 295 (1970).

Eliminating or curtailing the *res judicata* component of the relitigation exception also subjugates the federal courts' power to protect their judgments to a plaintiff's ability to avoid alternative means of federal jurisdiction. For example, if a suit which is filed in state court after the federal case has concluded contains federal questions or completely diverse defendants, the federal defendant can remove the case to federal court, at which point the federal court may apply traditional federal principles of *res judicata* in order to protect the prior federal judgment. See *Poe*, 695 F.2d 1103. Under the Ninth Circuit's decision in *Western Systems*, federal courts may accomplish the same result through a federal injunction without being dependent upon the defendants' ability to remove the case. However, the Fifth Circuit's approach in this case permits plaintiffs to defeat the federal court's enforcement authority over its own judgments by adding non-diverse defendants to the subsequent state court case so as to prevent removal.

Moreover, the finality of the federal judgment under those circumstances will no longer be decided on the basis of federal preclusion principles, but will instead be subject to the vagrancies of state preclusion law. The risks inherent in exposing federal judgments to the differing interpretations under state preclusion law are more real than theoretical in this case. As noted by the court of appeals, "Louisiana does not recognize the principle of collateral estoppel, and as applied in Louisiana at the time, *res judicata* might not protect the individual defendants, Rhodes and Raley, from being subjected to relitigation

. . . ." (Appendix, p. 31a). Federal law, on the other hand, would clearly permit an injunction under the relitigation exception to reach Allstate's privies, Rhodes and Raley. *See Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 721 (5th Cir. 1990), cert. denied 499 U.S. 925 (1991).

The Fifth Circuit's approach in the instant case may thus skew the decision making process in the federal courts. A federal district court which lacks power to enjoin further litigation of untimely or otherwise inadequately presented claims, may choose to overlook the timing of or deficiencies in those claims in order to ensure that the federal trier of fact sits in judgment of the entire controversy. Federal defendants may also be inclined to forego otherwise valid objections to untimely or inartful claims in order to avoid the costs and risks of future litigation on another front. Even plaintiffs can be expected to anticipate a defendant's reluctance to challenge late filings, and will be wise to withhold claims until the last moment in order to gain either the advantage of surprise, or, alternatively, preservation of the right to later assert those claims in state court in the event they are rejected by the federal court. Indeed, in the present case, it was only Deus' failure to present his fraud claims to the district court in a timely manner which gave him the green light to pursue those claims in state court. The Fifth Circuit's analysis places into the hands of the dilatory plaintiff the ability to force a court to choose between exercising its discretion regarding the orderly conduct of cases on its docket and protecting and effectuating its judgments through the relitigation exception to the Anti-Injunction Act.

Deus' failure to appeal the district court's denial of his motion to amend his complaint is, perhaps, the best illustration of the potential manipulation of the judicial system stemming from the court of appeals' decision. Rather than appeal the denial of his motion to amend, Deus utilized the district court's refusal to entertain his un-

timely fraud claims as a springboard to state court assertion of those claims. This attempt to forego federal appellate review in order to proceed anew in state court directly violates principles against claims-splitting, as codified in the relitigation exception, and it presents the flipside to *Atlantic Coast Line*, 398 U.S. 281 (1970). In that case, this Court rejected a defendant's attempt to forego state court appellate review of an unfavorable state court judgment in order to secure a federal injunction against enforcement of the state court's order. *Id.* at 293-96. This Court condemned forum shopping and claim-splitting in *Atlantic Coast Line* by invalidating a federal injunction against the state court order. Ironically, those same principles would also be advanced in the present case by rejecting Deus' election to forego federal appellate review of the denial of his motion to amend so that he could pursue his fraud claims in state court.

As was the case in *Poe*, Deus' recourse with respect to the denial of his motion to amend was through the Fifth Circuit. In choosing to forego appealing the denial of his motion to amend his petition, he voluntarily relinquished his opportunity to litigate those claims in federal court.[5] Having done so, the fraud claims should now be precluded from relitigation as part of the claims that "could have been brought" in the federal action.

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[5] See also *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 69 L.Ed.2d 103 (1981) (Relitigation of unappealed adverse judgment held barred by *res judicata*, and Restatement (Second) of Judgments, Section 26, Comment (b).

III. THE FIFTH CIRCUIT'S REFUSAL TO AFFIRM THE INJUNCTION AGAINST FURTHER STATE COURT LITIGATION OF ISSUES OR CLAIMS, THE OUTCOME OF WHICH IS NECESSARILY DETERMINED BY THE FEDERAL COURT'S PRIOR DECISIONS, CONFLICTS WITH THE SEVENTH CIRCUIT'S APPROACH AND MISAPPLIES *CHICK KAM CHOO*

The Fifth Circuit not only failed to apply *res judicata* principles in its analysis, it also failed to apply collateral estoppel principles. Even if *Chick Kam Choo* requires an actual decision on the merits of an issue before a federal court may enjoin relitigation of the issues in state court, Deus' fraud claims should still be foreclosed through application of collateral estoppel principles also espoused in *Chick Kam Choo*.[6]

In *Chick Kam Choo*, the district court had found that under applicable choice of law principles, the law of Singapore, rather than the statutory and maritime law of the United States applied. In subsequent state court litigation plaintiffs argued that Texas law applied. Although the district court did not decide whether Texas law applied, this Court affirmed the injunction to the extent it precluded the state court from deciding the choice of law issue. After looking to the district court decision to determine what claims or issues had been litigated, this court stated:

> Because in its 1980 decision, the district court decided that Singapore law must control petitioner's lawsuit, a *decision that necessarily precludes the ap-*

[6] Principles of collateral estoppel are intended to protect finality of judgments and avoid inconsistent decisions by ensuring that a plaintiff will not be able to undermine the integrity of a court's resolution of a factual or legal issue by relitigating the decision on that claim or issue in another forum. Collateral estoppel "refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984).

> *plication of Texas law*, an injunction preventing relitigation of that issue in state court is within the scope of the relitigation exception to the Anti-Injunction Act.

486 U.S. at 193. (emphasis added).

In this case, the Fifth Circuit disregarded the preclusive effect the district court's judgments should have on the subsequent state court litigation By failing to perform the required analysis as to whether the district court's decisions necessarily preclude resolution of the state court fraud claims in Deus' favor, the lower court's judgment fails to give effect to the principles of collateral estoppel which underlie the relitigation exception. As it stands, the Fifth Circuit's holding is in direct contradiction to the holding in *Chick Kam Choo* that an injunction is appropriate to bar the relitigation of a claim or issue the outcome of which is necessarily dictated by the district court's prior decision of another question. *Id.*

In contrast to the Fifth Circuit, the Seventh Circuit correctly applied *Chick Kam Choo* when it considered the collateral estoppel aspect of an injunction issued pursuant to the relitigation exception in *Rutledge v. Scott Chotin, Inc.*, 972 F.2d 820 (7th Cir. 1992). In *Rutledge*, the court interpreted a state statute dealing with a dismissal based on *forum non conveniens* as not requiring a waiver of a statute of limitations defense in that case. The federal court subsequently issued an injunction to prevent reinstatement of the state court action based on an alleged violation of the previously interpreted statute, due to a refusal by the defendant to waive its limitations defense. In that case, the Court of Appeals found that while the federal court did not directly address the reinstatement issue, its decision that a waiver was not required under the circumstances presented necessarily dictated the result of a motion to reinstate for failure to waive the limitations defense. The Seventh Circuit correctly decided that:

> The relitigation exception allows the district court to enjoin the decision of an issue the result of which is necessarily dictated by the district court's prior decision of another question.

972 F.2d at 825.

Deus' "fraud" claims are set out in both the state and federal amendments and are based upon the same allegations of unfair treatment and discipline by Allstate which the district court already fully heard and decided against Deus. Recovery in a state court action for the same "wrongs" under the new heading of fraud is necessarily precluded pursuant to this Court's ruling in *Chick Kam Choo* and pursuant to principles of collateral estoppel. In failing to give full consideration to the collateral estoppel effect of the district court's decision, the Fifth Circuit's decision narrows the scope of the relitigation beyond what was mandated by this Court in *Chick Kam Choo* and functionally vitiates the intent of the exception to protect the finality of federal court judgments and to protect prevailing parties from costly and repetitious litigation. *See Rutledge*, 972 F.2d 820.

An additional reason for granting the writ, therefore, is to save Petitioner from an improper and unjust result reached in the face of clear precedent which requires the opposite outcome. The substance of Deus' dispute with Allstate has been fully litigated and resolved on the merits in favor of Allstate, both in the district court and on appeal. All material issues underlying the controversy having been resolved, Allstate should be entitled, pursuant to principles of collateral estoppel, to put this dispute to rest rather than face further litigation of identical issues under the guise of "new claims."

CONCLUSION

The Petition for Writ of Certiorari should be granted, and the judgment of the court of appeals overturning the district court's injunction against further litigation of Deus' fraud claims should be reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 92-4795, 92-4995, 92-5069,
92-5294 and 93-5226

FRANK S. DEUS,
Plaintiff-Appellant,

v.

ALLSTATE INSURANCE CO.,
Defendant-Appellee,

VOORHIES & LABBÉ,
Intervenor-Appellant.

FRANK S. DEUS,
Plaintiff,

v.

ALLSTATE INSURANCE COMPANY,
Defendant-Appellee,

v.

NATIONAL NEIGHBORHOOD OFFICE AGENTS'
CLUB, INC., and RANDY J. LANE,
Movants-Appellants.

FRANK S. DEUS,
Plaintiff-Appellant,
v.

ALLSTATE INSURANCE CO.,
Defendant-Appellee.

FRANK S. DEUS,
Plaintiff-Appellant,
Cross-Appellee,
v.

ALLSTATE INSURANCE CO.,
Defendant,
v.

VOORHIES & LABBÉ,
Intervenor-Appellee Cross-Appellant.

FRANK S. DEUS,
Plaintiff-Appellant,
v.

ALLSTATE INSURANCE CO.,
Defendant-Appellee.

Appeals from the United States District Court
for the Western District of Louisiana

March 8, 1994

Before HENDERSON,* SMITH, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

I.

Plaintiff, Frank Deus, was an agent for defendant Allstate Insurance Co. ("Allstate") in its Jackson, Mississippi, region from 1968 until August 1987, when he suffered a mental breakdown rendering him unable to work. He now suffers from severe tinnitus (ringing in the ears) and depression. He claims that Allstate intentionally inflicted severe emotional distress upon him, causing his breakdown. During the time at issue in the suit, Deus worked under the following managers: Dave Blankenhorn, Regional V.P.; Ken Artiques, Human Resources; Dusty Rhodes, Territorial Sales Manager ("TSM"); and Scott Raley, Market Sales Manager ("MSM").

Throughout his nineteen years with Allstate, Deus was a "company office agent," or "COA." His status as a COA was established through an employment agreement with Allstate, obligating Allstate to provide support for Deus and his office. Deus's agreement stated that Allstate could not terminate him for unsatisfactory work unless it first gave him notice, pursuant to a specific multi-phase procedure to determine that his work was unsatisfactory and that his job was in jeopardy. After giving notice, Allstate was required to provide Deus a "reasonable opportunity to bring his performance up to satisfactory standards" and could not fire him for unsatisfactory work if he responded favorably.

In early 1985, Allstate began the Neighborhood Office Agent ("NOA") program in the Jackson region. The NOA program was designed to place agents in customers' neighborhoods by establishing smaller offices in multiple

* Circuit Judge of the Eleventh Circuit, sitting by designation.

locations around town. The NOA program was part of an overall plan called Foundation for Growth, designed to increase Allstate's business.

Under the old system, Allstate directly paid office expenses, while under the NOA system, Allstate provided money directly to the NOA (based upon the agent's production) to spend in operating an office. An agent also could spend additional money to enlarge his office or staff. Existing agents entering the NOA program could either retain their old contract and compensation schedule or convert to a new contract basing compensation upon new business production. After Allstate began the NOA program, all new agents were hired into that program.

Allstate realized that the NOA program would disrupt existing company offices and the agents who stayed in them, but it believed that the NOA system was the best way to facilitate growth and market reach for the company. Managers in the Jackson region notified their agents of the expected detrimental impact on the existing agents of the transition to the NOA system. Agents were made aware that the marketing advantages of the NOA system would result in stiffened competition.

As agents left the company offices, the most desirable NOA locations would be taken by those agents who first elected to enter the NOA program. The agents were warned that as agents left company offices to go into NOA offices, it could become necessary to close and/or consoldiate those offices or move the remaining agents to more productive locations. Further, as the number of agents in a particular office decreased, secretarial help and other administrative support probably would be cut back accordingly.

These statements were made as factual representations of what the company expected to see as a consequence of the development of the NOA program. Although some agents personally perceived these warnings as threats,

there was no probative testimony to support the claim that it was Allstate's goal to pressure existing agents to convert to the new program.

Groups of similarly-situated agents, called peer groups, formed the basis for the agent ranking, performance evaluation, and disciplinary procedures. As the NOA agents became established, the peer groups were changed to avoid comparisons among agents with disparate marketing advantages and production possibilities. Rate changes in rural areas also necessitated protecting those agents from comparisons with agents operating in a more competitive market. There was no probative testimony supporting Deus's contention that his peer group was altered for the purpose of inflicting emotional distress on him.

Some veteran agents, such as Deus, were apprehensive about joining the NOA program, which could be more risky because of the need for more aggressive selling and its emphasis on new business. The advertising and other marketing advantages offered to agents entering the NOA program also caused apprehension for the remaining COA's. There is no evidence, however, that Allstate's actions were anything other than efforts to encourage participation in the NOA program and to exemplify its emphasis on developing new business.

In 1984, Allstate fired twenty percent of the managers in Deus's office and brought in a number of new people. There is evidence that these changes increased tension for everyone in that office. But there is no indication that Deus was the only agent affected or that the changes were made with the intent of causing anyone emotional distress.

During the 1985-87 time period, Allstate's disciplinary process in the Jackson region involved three steps: the unsatisfactory business analysis review, the corrective review (a ninety-day period during which an agent had to meet the sales averages of his peer group), and the

job-in-jeopardy (a second ninety-day period during which an agent again had to meet specific sales goals), the last of which could lead to termination. The job-in-jeopardy could not be administered without the written approval of the Jackson managers as well as an agent's territorial and district sales managers. At each step, if the goals were met, the disciplinary process would cease.

Deus was placed on corrective review in 1985 and 1987. At the end of his second corrective review term, he had not met his goals. He claims that his failure resulted from Allstate's manipulating the deadline for submitting new accounts.

Nonetheless, Deus was taken off formal corrective review. Scott Raley placed Deus on an unofficial, verbal, local review program that could not result in Deus's termination. Following this discussion with Raley, Deus left work and never returned.

During the period of time that Deus identifies as creating mounting stress, his preexisting tinnitus altered in character and intensified. He admitted to making errors and mistakes at work and having short-term memory problems to the point that he feared he was getting Alzheimer's disease in the spring of 1986. He consulted a doctor but never informed any of his supervisors of his worsening condition, and he testified that he had no idea how his supervisors could have discovered it.

II.

In 1988, Deus filed suit against Allstate in both federal and state court, alleging intentional infliction of emotional distress, abuse of rights, defamation, breach of contracts, negligent infliction of emotional distress, and worker's compensation. He proceeded with his federal court case, withholding his state case until the eve of trial.

The district court granted summary judgment to Allstate on Deus's claims for worker's compensation, abuse

of rights, negligent infliction of emotional distress, and negligent misrepresentation. Of these claims, Deus has appealed only from the denial of worker's compensation and abuse-of-rights claims.

At the close of Deus's case, Allstate moved for judgment as a matter of law pursuant to FED.R.CIV.P. 50(a) on Deus's remaining claims for breach of employment contract and intentional infliction of emotional distress. At the close of its defense, Allstate reurged its motion. The court granted the motion as to the contract claim but kept the motion under advisement as to the claim for intentional infliction of emotional distress.

The remaining claim went to the jury, which decided for Deus. Allstate contends that the jury verdict was never made the judgment of the court. The court issued a ruling denying the pending rule 50 motion on the merits of the intentional infliction of emotional distress claim, but it kept Allstate's prescription defense to that motion under advisement and requested briefing. Then, the district court reconsidered, *sua sponte*, its earlier ruling denying Allstate's rule 50(a) motion as to the merits of Deus's claim for intentional infliction of emotional distress and, on July 10, 1992, granted Allstate's motion and rendered judgment in favor of Allstate, dismissing Deus's suit. 800 F.Supp. 420.

On July 28, 1992, Deus filed an appeal from all judgments dismissing his claims for worker's compensation, abuse of rights, breach of contract, and intentional infliction of emotional distress. On August 10, 1992, Allstate filed in district court a motion for a preliminary and permanent injunction, seeking to enjoin further litigation of the state action. The court granted this motion, which action Deus also appeals.

There were also motions for intervention filed by the National Neighborhood Office Agents' Club ("NNOAC") and Randy J. Lane and by Deus's original attorneys,

Voorhies and Labbé. The former was denied, the latter granted.

III.

A.

This court reviews a grant of summary judgment *de novo*. *Hanks v. Transcontinental Gas Pipe Line Corp.*, 953 F.2d 996, 997 (5th Cir.1992). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. *Hanks*, 953 F.2d at 997.

We begin our determination by consulting the applicable substantive law to determine what facts and issues are material. *King v. Chide*, 974 F.2d 653, 655-56 (5th Cir.1992). We then review the evidence relating to those issues, viewing the facts and inferences in the light most favorable to the non-movant. *Id.* If the non-movant sets forth specific facts in support of allegations essential to his claim, a genuine issue is presented. *Celotex*, 477 U.S. at 327, 106 S.Ct. at 2554.

The district court's court's grant of judgment as a matter of law on Deus's tort and contract claims is reviewed *de novo*. *Charles E. Beard, Inc. v. McDonnell Douglas Corp.*, 939 F.2d 280, 282 (5th Cir.1991). Judgment as a matter of law is proper only if, under the governing law, there can be but one reasonable conclusion as to the verdict. As in the case of a motion for summary

judgment, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). Furthermore, the inferences are to be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

B.

Deus contends that the court erred in granting Allstate's rule 50(a) motion on his claim for intentional infliction of emotional distress. Finding no error, we affirm.

1.

There are three elements to a claim for intentional infliction of emotional distress under Louisiana law: (1) that Allstate's conduct was so extreme in degree and so outrageous in character that it went beyond all bounds of decency and was utterly intolerable in a civilized community; (2) that such conduct caused severe emotional distress; and (3) that Allstate intended, by performing the acts complained of, to inflict severe emotional distress on Deus, or that Allstate knew that such severe emotional distress would be certain or "substantially certain" to result from the conduct. *White v. Monsanto Co.*, 585 So.2d 1205, 1209 (La.1991). The test established by *White* was derived from the RESTATEMENT (SECOND) OF TORTS (the "RESTATEMENT") § 46. *White*, 585 So.2d at 1209 ("[w]e affirm the viability in Louisiana of a cause of action for intentional infliction of emotional distress, generally in accord with the legal precepts set forth in the Restatement text and comments.").

The conduct complained of "must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atro-

cious and utterly intolerable in a civilized community." *Id.* "Liability," however, "does not extend to mere insults, indignities, threats, annoyance, petty oppressions, or other trivialities." *Id.* "The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind." RESTATEMENT § 46, comment d.

2.

This court has followed the RESTATEMENT in applying Texas's law of intentional infliction of emotional distress. *See Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1143 (5th Cir.1991); *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 306 (5th Cir.1989). Because Louisiana has derived its law on this tort from the RESTATEMENT, the RESTATEMENT provides a guide to the likely decision of the Louisiana courts if confronted with the issue.

What actions are extreme and outrageous will differ according to context. "[D]isciplinary action and conflict in a pressure-packed workplace environment, although calculated to cause some degree of mental anguish, is not ordinarily actionable." *White*, 585 So.2d at 1210. In *Wilson*, the court noted that to manage its business properly,

> every employer must on occasion review, criticize, demote, transfer, and discipline employees. We also acknowledge that it is not unusual for an employer, instead of directly discharging an employee, to create unpleasant and onerous work conditions designed to force an employee to quit, i.e., "constructively" to discharge the employee. In short, although this sort of conduct often rises to the level of illegality, except in the *most* unusual cases it is not the sort of conduct, as deplorable as it may sometimes be, that constitutes "extreme and outrageous" conduct.

939 F.2d at 1143.

We have recognized that the rough-and-tumble of daily business life "contemplate[s] a degree of teasing and taunting that in other circumstances might be considered cruel and outrageous." *Id.* (quoting N. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS (5th ed. 1984 Supp. 1988)). The tragic heroism of Willy Loman in THE DEATH OF A SALESMAN and the furious sales competition of David Mamet's GLENGARRY GLENROSS suggest that salesmen such as Deus come to tolerate management pressures that many would consider to be beyond the pale.

In *Wilson*, the employer assigned the plaintiff, an executive with thirty years' experience, to janitorial duties with the evident intent to target him for specific humiliation. The court suggested that the employer's conduct was outrageous if it had "*intentionally and systematically* set out to humiliate him in hopes that he would quit." *Wilson*, 939 F.2d at 1145. This "mean-spirited" attempt to "demean" and "humiliate" Wilson provided him with a legitimate claim. The employer also reassigned his duties, created a long-term program to introduce younger persons into sales and management positions, and refused to grant his request for a transfer. Other managers refused to work with him. Nonetheless, absent the demotion of Wilson to janitor, the other actions were insufficient, standing alone, to be considered extreme and outrageous.

In *Dean*, the plaintiff, a woman, was a bank employee. In order to prevent her transfer to a superior position, the defendant placed bank checks in plaintiff's purse in order to make it appear that she was a thief. There were a number of other allegations of impropriety, including rejecting her transfer request on the ground that "women usually don't go into that department" and selecting a lesser qualified man instead. Management transferred her from desk to desk for no reason. Plaintiff was required to do more work than other clerks and was "subjected to unfair harassment." Management also used "special" re-

views (that only the plaintiff received) to downgrade her performance. *See Wilson*, 939 F.2d at 1143. Despite this litany of unseemly conduct by defendant, however, the court noted that it was only the "check incidents" that made the conduct outrageous.

Allstate's actions lack the special conditions removing *Dean* and *Wilson* from "the realm of an ordinary employment dispute." As *Dean* and *Wilson* indicate, an employer may call upon an employee to do more work than other employees, use special reviews on a particular employee and not on others to downgrade his performance, and institute long-range company plans to move younger persons into sales and management positions without engaging in extreme and outrageous conduct. *Wilson*, 939 F.2d at 1143-45. Deus has not demonstrated that his managers intended to do anything other than provoke or motivate him into performing at the levels he had previously shown he was capable of, show him the benefits of the NOA program, and make him and all the other agents aware of what changes could be expected from the NOA program.

Each of Deus's grievances was a foreseeable result of the application of Allstate's new NOA system. Allstate established and executed neutral rules that had predictable consequences for Deus and other established agents. Allstate warned COA agents that the marketing advantages of the NOA offices would increase competition for the COA's. As agents left the COA's, the most desirable NOA locations would be taken by those agents who first elected to enter the NOA program. The agents were warned that as agents left company offices to go into NOA offices, it could become necessary to close and or consolidate those offices or move the remaining agents to more productive locations. As the number of agents in a particular office decreased, support services also would be reduced.

The evidence indicates that Allstate withdrew support from Walsworth, who was already an NOA. Allstate believed that its future profitability was linked to the development of the NOA system. Thus, as Ivy testified, the introduction of the NOA caused difficulty for many of the established agents. To the extent that Allstate manipulated peer groups, it was in order to demonstrate the superior production of NOA's over COA's, not to harass Deus for any personal reasons.

Deus was not targeted for specific abuse. The fact that he saw himself as a scapegoat was secondary to Allstate's permissible purpose of furthering its business goals. "There is no occasion for the law to intervene in every case where some one's [*sic*] feelings are hurt." RESTATEMENT § 46, comment d.

3.

Deus contends that even if there were no specific instances of Allstate's outrageous conduct, a repeated pattern of minor annoyances can rise to an actionable level. "This has been characterized as a sliding scale approach under which even relatively 'mild' harassment may become tortious if continued over a substantial time period." *Bustamento v. Tucker*, 607 So.2d 532, 538 (La. 1992). Through repeated harassment, minor isolated acts may create a "hostile work environment" amounting to outrageous conduct.

Cases in Louisiana and elsewhere recognizing hostile environment claims have limited the tort's reach to harassment falling outside the standard friction arising from an employment relationship and infringing on issues unrelated to employment and protected by statutory and constitutional rights. In *Bustamento*, the outrageous conduct was sexual harassment and threats of physical violence. In *Contreras v. Crown Zellerbach Corp.*, 88 Wash.2d 735, 565 P.2d 1173, 1174 (1977), the plaintiff was an Hispanic subjected to continuous "humiliation and

embarrassment by reason of racial jokes, slurs, and comments." In *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal.3d 493, 86 Cal.Rptr. 88, 468 P.2d 216, 218 (1970), a black employee was subjected to "vituperative language" and "vindictive conduct" by his white supervisor as a result of his race.

In each case recognizing the hostile environment, there was some factual element that took the case beyond the scope of an ordinary employment dispute. In each case, the harassment dealt with issues unrelated to the plaintiff's work performance and touched upon traditionally protected subjects. There are no such circumstances here.

4.

An employee may be entitled to greater protection against "insult and outrage by a supervisor with authority over him than if he were a stranger." *White*, 585 So.2d at 1210. "The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests." *Id.*; RESTATEMENT § 46, comment e. Nonetheless, defendants will not be liable "for mere insults, indignities, or annoyances that are not extreme or outrageous."

In *Hall v. May Dep't Stores Co.*, 292 Or. 131, 637 P.2d 126 (1981), the plaintiff, a young sales clerk, was accused of stealing money from her register. She was questioned by the defendant's head of security who admittedly without adequate proof to take legal action threatened arrest and imprisonment if she did not admit to her alleged embezzlement. The court noted, "In many respects employment remains an arms-length adult relationship between parties intent on securing divergent rather than joint interests. But an additional element appears when an employee is subjected to severe mental and emotional distress, not as an incidental effect of an un-

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pleasant confrontation, but intentional as a cold blooded tactic of interrogation upon scanty evidence." *Id.* 637 P.2d at 133.

Similarly, in *Maggio v. St. Francis Medical Ctr.*, 391 So.2d 948 (La.App.2d Cir.1980), *writ denied*, 396 So.2d 1351 (1981), the supervisor intentionally caused an employee to become complicit in illegal activity and to breach an ethical duty. In *Engrum v. Boise S. Co.*, 527 So.2d 362 (La.App. 3d Cir.1988), the plaintiff stated a claim for intentional infliction of emotional distress where a payroll check was intentionally altered by the company, resulting in the employee's arrest.

In the current case, however, Deus has not explained how Allstate abused its position of trust or power. His argument is that agents who did not enter the NOA program would have a difficult time meeting their production goals. His complaints are nothing more than dissatisfaction with Allstate's marketing strategy. Absent evidence that Allstate abused its position of authority, he is not entitled to greater protection than is the average employee engaged in an employment squabble.

5.

Under *White*,

> [t]he defendant's knowledge that plaintiff is particularly susceptible to emotional distress is a factor to be considered. But the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt is not enough. It follows that unless the actor has knowledge of the other's particular susceptibility to emotional distress, the actor's conduct should be judged in the light of the effect such conduct would ordinarily have on a person of ordinary sensibilities.

White, 585 So.2d at 1210. "Thus the conduct may become heartless, flagrant, and outrageous when the actor

proceeds in the face of such knowledge, where it would not be so if he did not know." RESTATEMENT § 46, comment f.

Deus has presented no evidence that Allstate was aware of his pre-existing health problems, nor that Allstate had any reason to believe that he would react especially negatively to the impact of its actions. In fact, Deus testified that he did not tell any supervisors of his deteriorating physical and mental condition, because he considered his medical condition to be his "personal affairs" and "a private thing." He testified that he knows of no way that his supervisors could have discovered his medical state. He never mentioned his bipolar disorder, the intensity of his tinnitus, or that he was under a physician's care and on medication.

Therefore, Allstate's alleged actions properly should be evaluated according to the effect their conduct would have on a person of ordinary sensibilities. Applying this standard, we affirm the district court's ruling for the reasons indicated above.

C.

Allstate's alleged mistreatment of Deus was not sufficiently thoughtless to rise to the level of outrageous necessary to impose liability under Louisiana law. As a result, we need not consider the causation and intent elements under *White*. Failing to find a factual predicate necessary to justify a finding of outrageous conduct by Allstate, we affirm the district court's grant of Allstate's rule 50(a) motion for judgment as a matter of law.

IV.

Deus contends that Allstate's behavior constituted a breach of his employment contract. He contends that (1) Allstate's actions constituted wrongful discharge or constructive termination; (2) Allstate breached a provision of the written contract to provide fair procedures to

evaluate his performance; and (3) Allstate breached its contractual obligation to provide in good faith all necessary assistance and support for Deus to sell insurance from his company office. The district court dismissed all three claims under rule 50(a), holding that Louisiana does not recognize the concept of constructive termination and that any attempt by an employer to limit its right to terminate an at-will employee violates public policy. The district court erred in holding that Louisiana does not recognize a claim for "constructive termination," *see Clemons v. Blache*, 501 So.2d 1020, 1022 (La.App.2d Cir.1987); *Carlson v. Ewing*, 219 La. 961, 54 So.2d 414 (1951), but it did not err in holding that the alleged limits on Allstate's power to terminate Deus were invalid.

A.

Allstate contends that Deus's contract was an at-will contract terminable at any time by either the employer or employee; thus, he has no valid enforcement action. Deus contends that Allstate voluntarily limited its power to treat him as an at-will employee.

The Louisiana Civil Code provides for two types of contracts for hire: a contract for a fixed time, *see* LA.CIV. CODE art. 2746, and the contract of a servant terminable at the will of the parties, *see* LA.CIV.CODE art. 2024, 2747. Employees for a fixed time are considered not as hired out but "as having sold their services."

Employment contracts cannot be binding for a term longer than ten years. The only damages available for breach of contract is the salary for the unexpired term. *See* LA.CIV.CODE art. 2749. Unless the employment contract is for a definite period of time, there is no enforceable action for damages under Louisiana law, as the contract can be terminated at the will of either the employee or the employer. *Brannan v. Wyeth Labs.*, 526 So.2d 1101, 1104 (La.1988).

Generally, lifetime employment contracts are unenforceable in Louisiana, unless the employee has given

some "valuable consideration" other than performance of the work entailed by his job. *Id.* There are no cases identifying what consideration will be valid to create a lifetime contract. The cases suggest, however, that valid consideration includes such activities as where an employee closed out an ongoing business to do work of the same nature for someone else; gave his employer a secret formula for manufacturing a special product; or settled a personal injury claim against his employer in return for lifetime employment. *See Pitcher v. United Oil & Gas Syndicate*, 174 La. 66, 139 So. 760, 761 (1931) (citing annotation at 35 A.L.R. 143-49).

Deus asserts that he proffered consideration by accepting a specified commission rate from Allstate that he claims is lower than the rates given by some insurance companies and because he agreed to the terms of Allstate's contract giving Allstate ownership over any of the accounts he developed, instead of Deus's retaining ownership of the accounts. This, however, is a standard employment contract, not the type of "special consideration" necessary to invoke that exception.

When Deus went to work for Allstate, he was essentially unemployed and had no prior experience in the insurance business. He had no ownership of any accounts to sacrifice and no "following," and he did not bypass any alternate commission, such as another job offer, in exchange for employment with Allstate. Obviously, any alleged detriment he incurred for working for Allstate was offset by the gains from working under Allstate's sign. Since Deus has returned no valuable consideration in exchange for Allstate's limiting its right to terminate him at will, under Louisiana law he has no legal claim for damages, as his alleged lifetime contract is unenforceable.

B.

Deus argues that Allstate violated the terms of the contractual agreement requiring that he could not be termi-

nated for unsatisfactory work unless Allstate first fairly evaluated his work through the corrective review process and gave him a reasonable opportunity to correct any problems. He contends that that provision limited Allstate's power to treat him as an at-will employee. Deus argues that by forcing him to quit and improperly downgrading his performance, Allstate breached this provision and constructively terminated him.

This argument founders on the same rocks as does his previous claim. As this was a lifetime contract, this provision of the contract was enforceable only if Deus returned some additional consideration for this alleged limit on Allstate's power to terminate his employment at will. *Id.* He has provided no evidence that he did so. As one subsection of an invalid lifetime contract, the provision is invalid. Accordingly, under Louisiana law, his contract with Allstate is terminable at will.

The cases cited by Deus to show that an employer has the right to alter its right to terminate an otherwise at-will employee are inapposite. The issue is whether an employer can unilaterally limit its right to terminate an employee at will, absent return consideration from the employee. The cases Deus cites demonstrate only that the employer can limit its plenary power, not that it can do so unilaterally.

For instance, Deus quotes the lower court opinion in *Brannan* as stating that "[m]odification of this right to fire at will . . . must be shown by a specific contract or agreement." He omits the parenthetical concluding that paragraph, however: "But see [*Simmons v. Westinghouse Elec. Corp.*, 311 So.2d 28 (La.App.2d Cir. 1975)], stating that the agreement must be supported by extra consideration." *Brannon v. Wyeth Labs.*, 516 So.2d 157, 164 (La.App. 5th Cir.1987), *modified on other grounds*, 526 So.2d 1101 (La.1988). Likewise, Deus's reliance on *Morgan v. Avondale Shipyards*, 376 So.2d 516 (La.App. 4th Cir.1979), and *Williams v. Delta*

Haven, Inc., 416 So.2d 637 (La.App.2d Cir.1982), is misplaced, as the language he quotes is *dicta*, and the opinion is silent on whether modification of the right to terminate at will requires additional consideration to be valid.

C.

Deus also argues that Allstate breached its implied duty to perform its contractual duties "in good faith." He contends that Allstate assumed an obligation to provide all necessary assistance, equipment, and services to help him succeed in the insurance market. He seeks general damages pursuant to LA.CIV.CODE arts. 1997 and 1998 for breach of an obligation of good faith and fair dealing pursuant to LA.CIV.CODE art. 1983.

We conclude that Deus has not demonstrated that Allstate breached any implied obligation of good faith in executing its part of the bargain. There is no evidence that the secretarial staff was reduced in bad faith, nor that any phone lines were cut, as he alleges, nor that any other services or support to his office were unfairly reduced.

Also untrue is Deus's claim that Allstate promised what appeared to be endless assistance to its agents. Even if a valid part of the agreement (the terms relied upon by Deus are drawn from a letter independent of the agreement and signed by Allstate alone), the provision upon which Deus relies does not guarantee assistance unlimited in scope or duration. Instead, the terms limit assistance to training and guidance.

Deus also claims that Allstate made "oral representations" concerning "job security." These arguments are precluded by the original compensation agreement that disallows any amendment made without the requisite formalities.

Deus also is incorrect in saying that through "custom and practice" Allstate obligated itself to provide more

support and assistance to Deus in his marketing efforts. There is no evidence that Allstate withdrew reasonable support services from Deus's office. Further, Louisiana courts have implied terms from "custom and performance" only where there is no contract. Here, not only does a written agreement exist, but it specifically disallows unwritten modifications.

According to Deus, Allstate's Human Resources Policy Statements Manual creates binding obligations. Lacking appropriate formalities, however, the manual cannot amend the written agreement. Furthermore, the manual notes that it does not give rise to any obligations on Allstate's part. Instead, it reserves the right for Allstate to depart from the company's standard disciplinary procedures at its discretion.

Deus also complains about inadequate secretarial help after the inception of the NOA program. But, during the time of these events, the office went from one secretary for six employees to one for five. Thus, there is no evidence that Allstate breached its duty to perform its part of the contract in "good faith."

V.

The district court granted summary judgment for Allstate on Deus's claim for worker's compensation benefits. We affirm.

LA.R.S. 23:1031 provides,

> If an employee not otherwise eliminated from the benefits of this chapter, receives personal injury by accident arising out of and in the course of his employment, his employer shall pay compensation in the amounts, on the conditions, and to the person or persons hereinafter designated. . . .

At the time Deus became disabled, LA.R.S. 23:1021 defined an accident as follows:

> "Accident" means an unexpected or unforeseen event happening suddenly or violently, with or without human fault, and producing at the time objective symptoms of an injury.

Deus contends that Allstate has caused him two injuries that prevent him from returning to any type of gainful employment. He avers that he now suffers from debilitating tinnitus, a physical inner ear problem (causing "ringing" in the ears) that can be aggravated by stress. He says he also suffers from manic depression, a mental problem originating from a chemical imbalance.

Under Louisiana law, for a non-physical occurrence or event to give rise to a compensable injury, it must be "precipitated by an accident, i.e., an unexpected and unforeseen event that occurs suddenly or violently." *Sparks v. Tulane Medical Ctr. Hosp. & Clinic*, 546 So.2d 138, 147 (La.1989). "[A] mere showing that a mental injury was related to general conditions of employment or to incidents occurring over an extended period of time, is not enough to entitle the claimant to compensation." *Id.* *Sparks* indicates that mental damage can be compensable in cases such as where the plaintiff watched a co-employee fall to death after the collapse of a scaffold, robbery and fear of imminent sexual abuse, or a co-employee's suicide. "[A]bsent an identifiable accident of this type, an employee's general allegation that he is unable to work due to stress or tension caused by working conditions would not give rise to a compensable claim." *Id.*

Deus has not identified any incidents dramatic enough to distinguish his case from any other employee dispute. He has not identified any specific incident that *Sparks* suggests would be sufficient to treat his case as more than stress or tension caused by general working conditions. Thus, he is not eligible for worker's compensation for his injuries.

VI.

Deus contends that Allstate abused its right to discipline him under his contract and disciplined him falsely with the intent to harm him. Also, Allstate disciplined Deus for a purpose for which the right was not granted: to breach its contract by forcing him to quit or become an NOA. The district court rejected this claim. We affirm.

The Louisiana abuse-of-rights doctrine applies only if one of the following conditions is met: (1) The rights were exercised "exclusively for the purpose of harming another or with the predominant motive to cause harm"; (2) an absence of "of a serious and legitimate interest that is worthy of judicial protection"; (3) using "the right in violation of moral rules, good faith or elementary fairness"; or (4) "exercising the right for a purpose other than that for which it was granted." *Illinois Cent. R.R. v. International Harvester Co.*, 368 So.2d 1009 (La. 1979). Deus has not demonstrated that he has met any of the conditions necessary to establish a violation of the abuse-of-rights doctrine.

Allstate was implementing new policies designed to increase revenues; its policies were neutrally conceived and neutrally applied. The fact that Deus was a casualty of these changes does not, without more, establish that Allstate abused its right to discipline Deus. *See Ballaron v. Equitable Shipyards*, 521 So.2d 481, 483 (La.App. 4th Cir.), *writ denied*, 522 So.2d 571 (La.1988).

VII.

Deus contends that the district court abused its discretion by limiting him ot three days to present evidence in response to Allstate's rule 50(a) motion. FED.R.EVID. 403 and 611(a) give the district court wide discretion in the management of its docket and the presentation of evidence. A party is not entitled, as a matter of right, to put on every witness he may have. *Manbeck v.*

Ostrowski, 384 F.2d 970 (D.C.Cir.1967), *cert. denied*, 390 U.S. 966, 88 S.Ct. 1077, 19 L.Ed.2d 1170 (1968). In the management of its docket, the court has an inherent right to place reasonable limitations on the time allotted to any given trial. *United States v. Reaves*, 636 F.Supp. 1575 (E.D.Ky.1986).

The district court forewarned the parties that each would have three days to present its case. The record indicates that Deus improvidently squandered much of his time through the presentation of repetitive and immaterial evidence. He has pointed to no evidence that he was unable to present that would have aided his case in any significant way. The court did not exceed its discretion in limiting the amount of time the parties could have to make their cases.

VIII.

A.

The law firm of Voorhies and Labbé ("V & L") served as Deus's original attorneys. The contract signed with Deus gave V & L one-third of the gross amount collected, after deduction of expenses. Deus also was responsible for any expenses that V & L incurred on his behalf. V & L worked on Deus's case for two and one-half years. Before the case was completed, however, H. Lee Leonard and Keitha A. Leonard left V & L to form a separate practice. Shortly thereafter, Deus requested that his file be transferred to the Leonards' law firm.

V & L filed an intervention to collect on the retainer contract. On July 10, the court set aside the jury verdict and granted Allstate's rule 50(a) motion. This ruling, however, did not address V & L's pending intervention. Deus appealed on July 28, and V & L did not appeal until August 14, beyond the thirty-day deadline for filing appeal.

V & L contends, and the record reflects, that the district court did not resolve the intervention issue in its

July 10 order. Thus, on September 9, V & L filed a motion for summary judgment, seeking to recognize all sums due it under the contract with Deus, along with a motion to amend the original judgment to include the disposition of its claim against Deus. V & L also sought recognition of its lien rights against any settlement pursuant to LA.R.S. 37:218.

On December 3, the court granted V & L's summary judgment motion, holding that, as a matter of law, there was no issue of material fact and that V & L had acquired an interest in the suit pursuant to § 37:218. The court awarded V & L a minimum of $7,500 in costs from Deus under the contract and deferred determination of any additional costs and attorneys' fees due V & L until there was a final resolution by this court in the principal action.

The court also denied V & L's motion to amend its order, because the intervention issue was collateral for the purpose of the finality of the judgment. The court added that if this court reinstated the jury verdict against Allstate, Allstate would be required to make any checks payable jointly to Deus and V & L. On December 18, Deus timely appealed, *inter alia*, the judgment of July 10 and the ruling of December 3. On December 30, V & L filed a notice of appeal, seeking review of, *inter alia*, the July 10 and December 3 orders.

B.

An order that adjudicates fewer that [sic] all the claims or rights of fewer than all the parties does not terminate the action as to any claims or parties. FED.R.CIV.P. 54(b); *Borne v. A & P Boat Rentals No. 4*, 755 F.2d 1131, 1133 (5th Cir.1985). Under *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200, 108 S.Ct. 1717, 1721, 100 L.Ed.2d 178 (1988), "an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final."

A claim for attorneys' fees generally is not part of the merits to which the fees pertain. Attorneys' fees traditionally have been considered to be an element of "costs" awarded to the prevailing party, which are not generally treated as part of the merits judgment. *Id.* "Such an award does not remedy the injury giving rise to the action. . . ." *Id.* Where, however, the demand for attorney's fees is itself part of the merits, the general rule does not apply. *Id.; see also Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268, 108 S.Ct. 1130, 1131, 99 L.Ed.2d 289 (1988) ("a different issue may be presented if expenses of this sort were provided as an aspect of the underlying action. . . .").

"[O]rdinary costs and attorneys' fees are treated similarly, as collateral matters for purposes of finality." *Samaad v. City of Dallas*, 922 F.2d 216, 218 (5th Cir. 1991). A collateral action is one "which is subsidiary to another action." BLACK'S LAW DICTIONARY 261 (6th ed. 1990). Claims for attorneys' fees and costs are collateral because they are dependent on, and usually await, a determination of the claim on the merits. A claim for attorneys' fees or costs generally is not an independent claim for relief essential to the outcome of the case as a whole.

In the current matter, however, it is not accurate to classify V & L's claim as one for attorneys' fees in the sense that *Budinich* uses that term. V & L's intervention is an independent claim for damages under its retainer contract with Deus; thus, it "does . . . remedy the injury giving rise to the action. . . ." *See Budinich*, 486 U.S. at 200, 108 S.Ct. at 1721. As far as V & L is concerned, it is "the only game in town"; that is to say, it is an independent claim of one party against another that happens to be for fees earned and is brought in the form of an intervention in a pre-existing suit.

Where an attorney—and especially a former attorney—seeks judgment against his client, it should be considered a claim for substantive relief on the merits, not a collateral

issue of attorneys' fees. Thus, we conclude that V & L's intervention does not seek "attorneys' fees" under *Budinich* and that the intervention falls outside *Budinich*'s brightline rule classifying attorneys' fees issues as collateral.

Moreover, V & L's rights are not contingent on the outcome of the litigation, as was the case with the fees in *Budinich*. Its right to recover costs from Deus vested at the moment Deus signed the contract for representation. V & L's intervention sought judgment on its substantive right to satisfaction of the retainer contract, and it sought damages and a lien against Deus's recovery in the case. Thus, its right to satisfaction under the contract was independent of, not collateral to, Deus's cause of action. It is not, as was the fee claim in Budinich, the result of fee-shifting between prevailing and losing parties.

Also, until the district court ruled on V & L's intervention, under rule 54(b) no final judgment could be entered. Thus, the July 10 order was merely interlocutory, and final judgment was not entered until December 3 when the court granted the intervention. This means that all parties seeking review have timely noticed appeals from the matters encompassed by the July 10 order and the December 3 judgment.

Our holding that V & L's intervention is not a collateral claim for attorneys' fees does not contradict *Budinich* or circuit precedent applying *Budinich*. There, plaintiff sued to recover employment compensation allegedly due. Under Colorado law, the prevailing party was entitled to reasonable attorneys' fees as part of the costs of the action. *Budinich*, 486 U.S. at 197, 108 S.Ct. at 1718. In *Budinich*, unlike this case, attorneys' fees claims were collateral and vested only after a decision on the merits of the employment claim.

Similarly, in *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451, 102 S.Ct. 1142, 1166, 71 L.Ed.2d 325 (1982), the Court held that a request for attorneys' fees under 42 U.S.C. § 1988 did not seek

"reconsideration of matters properly encompassed in a decision on the merits." The Court concluded that a request for attorney's fees under § 1988 raises legal issues "separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed.'" *Id.* at 451-52, 102 S.Ct. at 1166-67.

Our cases have limited *Budinich*'s brightline rule to similar situations. In *Samaad,* 922 F.2d at 218, for instance, we held that "ordinary costs and attorneys' fees are treated similarly, as collateral matters, for purposes of finality." There, the party that lost the judgment was seeking to avoid the requirement of FED.R.CIV.P. 59(e) that costs be taxed to the losing party. A motion to reallocate costs had no effect on the underlying judgment, and therefore it was treated as collateral under *Budinich.*

Our holding that *Budinich* does not require V & L's intervention to be treated as a collateral issue is also consistent with decisions in other circuits that have considered the issue. In *Vargas v. Hudson County Bd. of Elections,* 949 F.2d 665, 667 (3d Cir.1991), the court held "that attorney's fees owed to a third-party were an element of damages sought by an indemnitee" and that a final judgment could not be entered until those fees were quantified.

The court found that the litigation actually consisted of "two separate, but interrelated, claims." The first claim was a class action by civil rights plaintiffs against Gerald McCann and his staff, seeking damages and attorneys' fees under § 1988. The McCann defendants had a general liability policy with National Union Fire Insurance Company on which National Union refused to pay. The second claim was brought by McCann against National Union seeking indemnification for damages and attorneys' fees that might be due the class plaintiffs, as well as attorneys' fees expended by the McCann defendants in defending the class action and, finally, attorneys' fees expended by those defendants in connection with the suit brought against National Union.

The *Vargas* court held that McCann's claim against National Union was not a collateral claim for attorneys' fees under *Budinich*. "The McCann defendants sought recovery of the class plaintiffs' fees as an element of damages against National Union and not as a prevailing party in the litigation." *Id.* at 670. Thus, the attorneys' fees were the purpose of the litigation against National Union. Had McCann been proceeding under a state statute awarding attorneys' fees in the litigation against National Union, it would have been a *Budinich* claim. *Id.* at 669.

Instead, the McCanns were seeking a construction of his insurance policy with National Union to indemnify him for expenses associated with the litigation against the civil rights plaintiffs. The expenses incurred by the civil rights plaintiffs were relevant to the calculation of the amount the National Union was required to indemnify McCann. But the expenses "for the litigation" with the civil rights plaintiffs were distinct from the expenses "for the litigation" with National Union. Thus, the expenses sought were not collateral to the civil rights litigation.

In *Justine Realty Co. v. American Nat'l Can Co.*, 945 F.2d 1044, 1047-48 (8th Cir. 1991), the court decided that *Budinich* "does not hold that fees provided by the contract and incurred in pre-litigation performance of the contract, and thus part of the substance of the claim (and therefore not 'for the litigation'), can never be compensation for injury and part of the merits." The court noted that "in some instances fees are substantively part of a plaintiff's compensatory damage and are necessary to remedy the damage or injury sustained by a plaintiff." *Id.* at 1048.

The court considered the example of an action against an insurer for failure to defend an underlying action as required by an insurance policy; plaintiff's costs and fees in defending the underlying action would constitute part of its damages. An action brought to recover a deficiency due after foreclosure on mortgaged property would be

treated analogously: Part of plaintiff's damages could be fees incurred in the foreclosure proceedings as provided in the underlying documents on which the separate foreclosure suit was brought. The court concluded, "Fees of this sort are substantively a part of plaintiff's compensation, and go to the merits of the claim rather than being 'for the litigation in question,' or 'attributable to the case.'" *Id.* at 1048.

In *Justine Realty*, the court distinguished between the costs incurred in sending the certified letters notifying American Can of its default on its lease, and any pre-litigation fees for legal advice concerning proper invocation of the terms of the settlement agreement. *Id.* at 1049. Under the contract between the parties, however, any fees incurred as a result of the litigation with American Can would be collateral. The court admitted that the recoverable costs were "probably minimal," but Justine Realty was entitled to them.

The current case is similar to *Vargas* and *Justine Realty*. V & L has an independent claim on the merits against Deus under its contract. V & L is not seeking damages or attorneys' fees associated with filing its current intervention motion, but is seeking damages due under its performance of the retainer contract before Deus replaced it. As such, its motion is not a collateral issue, as it is not "for the litigation in question" as contemplated by *Budinich*.

The district court's judgment could not have been final until it addressed V & L's intervention. Thus, final judgment was not entered until the December 3 judgment was rendered. Consequently, the district court erred by refusing to amend its earlier judgment to grant V & L costs.

C.

The court also did not err in granting V & L an interest in the case pursuant to LA.R.S. 37:218. That section awards to an attorney an interest in litigation if the agree-

ment is signed by the parties and recorded with the appropriate clerk of court. V & L did so, and therefore the district court did not err by awarding it an interest in the suit.

IX.

A.

At the same time that Deus filed suit in federal court, he filed a companion suit in the 15th Judicial District Court for the Parish of Lafayette, State of Louisiana. In addition to Allstate, the amended complaint named Larry Rhodes and Scott Raley, two of Allstate's managers, as individual defendants. Deus also added fraud and fraudulent misrepresentation as additional causes of action. While this appeal was pending, the district court enjoined the state court proceedings as to all defendants and all claims.

We review the issuance of the injunction for an abuse of discretion. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 3561, 45 L.Ed.2d 648 (1975). We conclude that the district court properly enjoined the state court claims against Allstate on the claims that have already been fully litigated, but abused its discretion by enjoining the fraud claims against all defendants.

B.

Allstate contends that the All Writs Statute, 28 U.S.C. § 1651(a), and the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, permit the district court to enjoin state court proceedings relitigating issues resolved by the district court. Allstate contends that it was entitled to equitable relief pursuant to 28 U.S.C. § 2283 because there is no adequate remedy in the state court that would provide the relief sought. Louisiana does not recognize the principle of collateral estoppel, and as applied in Louisiana at the time, *res judicata* might not protect the individual defendants, Rhodes and Raley, from

being subjected to relitigation of the issues and factual allegations decided by the district court.

The All Writs Statute and the relitigation exception to the Anti-Injunction Act permit a federal court to issue an injunction to prevent state litigation of issues or claims presented to and decided by it "to protect or effectuate its judgments." 28 U.S.C. § 2283; *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147, 108 S.Ct. 1684, 1689, 100 L.Ed.2d 127 (1988); *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 883 (5th Cir. 1993). The bar on relitigation of issues in state court applies to identical claims or causes of action. *Texas Employers Ins. Ass'n v. Jackson*, 862 F.2d 491, 501 (5th Cir.1988) (en banc), *cert. denied*, 490 U.S. 1035, 109 S.Ct. 1932, 104 L.Ed.2d 404 (1989). "It is founded in the well-recognized concepts of *res judicata* and collateral estoppel." *Chick Kam Choo*, 486 U.S. at 147, 108 S.Ct. at 1690. Accordingly, Deus's claims that have been actually considered and rejected by the district court are barred by the relitigation exception. *Id.* at 148, 108 S.Ct. at 1690; *see also Royal Ins.*, 3 F.3d at 883 (claims actually denied by the district court "fall[] squarely within the 'protect or effectuate its judgments' exception to the Act").

C.

Deus contends that even if the claims actually litigated were properly enjoined, the district court erred by extending the injunction to protect Allstate from claims not actually litigated and for protecting Rhodes and Raley, who were not parties in the first suit. Deus sought to amend his complaint to include this claim and the defendants, but the district court denied his motion. Having denied Allstate's motion to amend, the court erred in enjoining the fraud and fraudulent misrepresentation claims against Allstate, Rhodes, and Raley.

"[A]n essential prerequisite for applying the relitigation exception is that the claims or issues which the federal

injunction insulates from litigation in state proceedings actually have been decided by the federal court." *Chick Kam Choo,* 486 U.S. at 148, 108 S.Ct. at 1690. This "prerequisite is strict and narrow." *Id.* Principles of comity and federalism caution us against obstructing with state court proceedings. The Constitution devises a "dual system of federal and state courts," and the prohibitions of § 2283 are "[d]ue in no small part to the fundamental constitutional independence of the States." *Id.* at 146, 108 S.Ct. at 1689.

Because the district court denied Deus's petition to amend his complaint, he did not have an opportunity to litigate his fraud claims. As a result, he cannot be enjoined from arguing them to the state court. Had Deus not attempted to amend his complaint, an injunction probably would have been warranted under principles of *res judicata* and collateral estoppel embodied in § 2283. *See Chick Kam Choo*, 486 U.S. at 147, 108 S.Ct. at 1690. Under *Jackson*, "claim" is defined broadly to include "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Jackson*, 862 F.2d at 501 (adopting definition of RESTATEMENT (SECOND) OF JUDGMENTS § 24). Thus, any claims that he did not try to assert could have been enjoined.

X.

A.

During most of the discovery process and throughout the trial, the court record was sealed. The court closed the trial proceedings and refused to allow any persons other than the litigants to observe. Lane was present with his attorney on the first day of trial but, at Allstate's request, was ordered to leave the courtroom. NNOAC and Lane filed a motion to intervene in order to unseal the record. The district court denied the motion, claiming it lacked jurisdiction after the appeal was taken.

The court erred in holding that it lacked jurisdiction to grant the intervention, as the July 10 order was not a final judgment. Thus, the district court retained jurisdiction until the final judgment was issued on December 3.

Having determined that the district court incorrectly decided that it lacked jurisdiction, we usually would remand for the district court to consider the intervention on the merits. As a matter of law, however, it would be an abuse of discretion to grant the intervention in this case. Therefore, reviewing the merits, we affirm the denial of the motion to intervene.

B.

FED.R.CIV.P. 24 establishes the criteria for intervention:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

The intervention rule is intended to prevent multiple lawsuits where common questions of law or fact are involved but is not intended to allow the creation of whole new lawsuits by the intervenors. *Washington Elec. Coop v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92

(2d Cir.1990). The purpose of intervention is to admit, by leave of court, a person who is not an original party into a proceeding. The intervening party then becomes a "party" for the purpose of protecting some right or interest alleged by the intervenor to be affected by the proceeding. *In re Willacy County Water Control & Improvement Dist. No. 1*, 36 F.Supp. 36 (S.D.Tex. 1940).

Lane and NNOAC have no rights or claims that they wanted the district court to adjudicate. The only purpose of the attempted intervention was to gain access to documents and testimony that are subject to the protective order. The desire to intervene to pursue the vacating of the protective order and or the unsealing of the record is not a justiciable controversy or claim, absent some underlying right creating standing for the movants. Therefore, the reason for the requested intervention is not in accord with the purposes of rule 24.

For instance, in *Cunningham v. Rolfe*, 131 F.R.D. 587 (D.Kan.1990), the court found that permissive intervention was not appropriate where the applicants were merely trying to gain access to discovery materials generated in an earlier products liability suit for use in their own products liability case against the same defendant. In the absence of a claim or defense needing protection, the lack of an alternate remedy for NNOAC is of no consequence.

Intervention generally is not appropriate where the applicant can protect its interests and or recover on its claim through some other means. *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118 (5th Cir.), *cert. denied*, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115 (1970) Lane is already participating in a lawsuit against Allstate in federal court in Nevada. Thus, he can protect any interest he has in these materials by filing a discovery request in that case.

In summary, NNOAC and Lane have no personai interest affording them standing to intervene. As a matter of law, therefore, the intervention motion is denied.

XI.

Deus was a casualty of Allstate's need to keep up with competition. Deus was destined to fail in his efforts to keep doing business the old way. We AFFIRM the district court's rulings on everything except that we VACATE the injunction against the state court suit and the grant of V & L's motion to intervene and the award to V & L of an interest in the litigation. We enter judgment on the attempted intervention of NNOAC and Lane, DENYING the motion to intervene.

APPENDIX B

[Filed Feb. 11, 1992]

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 88-2099

JUDGE SCOTT

FRANK D. DEUS

-VS-

ALLSTATE INSURANCE COMPANY

MEMORANDUM RULING

After a review of the arguments and record submitted in support of and in opposition to the defendant's motion for summary judgment, the court concludes that defendant has not carried its burden under Fed. R. Civ. P. 56(c) in that its Statement of Material Facts filed with its motion does not dispose of all genuine issues of material fact regarding:

(1) Whether plaintiff, Frank S. Deus (Deus), is entitled to recover from Allstate Insurance Company (Allstate) for breach of contract;

(2) Whether Deus can establish the essential elements to support a claim for the tort of intentional infliction of emotional distress, releasing him from the exclusivity of the Louisiana Worker's Compensation Law.

There is no dispute about the following facts:

(1) Plaintiff's tinnitus and depression progressed gradually, over a period of years, until it became ultimately disabling.

(2) Allstate had a legitimate interest in utilizing its system of progressive discipline.

Deus has no claim for worker's compensation in that he did not have an "injury" within the meaning of LA-R.S. 23:1021, *et seq.* Plaintiff also has no claim against Allstate under any "abuse of rights" theory which is recognized by Louisiana courts. *Lambert v. Maryland Casualty Co.*, 403 So. 2d 739, 759 (La. App. 4th Cir. 1981), affirmed, 418 So. 2d 553 (La. 1982); *see also, Walther v. National Tea Co.*, 848 F.2d 518 (5th Cir. 1988). Thus, these two claims are DISMISSED.

Additionally, the following claims made by Deus are precluded, and thus dismissed:

(1) Plaintiff's claim for negligent infliction of emotional distress is precluded by the exclusivity of the Louisiana Worker's Compensation Law.

(2) Plaintiff's claim for damages under the theory of negligent misrepresentation is subsumed by his breach of contract claim.

Accordingly, defendant's Motion for Summary Judgment is GRANTED in part and DENIED in part.

DONE AND SIGNED at Alexandria, Louisiana, this 11th day of February, 1992.

/s/ Nauman S. Scott
United States District Judge

APPENDIX C

[Filed Feb. 11, 1992]

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 88-2099

JUDGE SCOTT

FRANK S. DEUS

-VS-

ALLSTATE INSURANCE COMPANY

ORDER

Considering the foregoing Motion; it is

ORDERED that the Motion for Leave to File Third Supplemental and Amending Petition filed on behalf of plaintiff is hereby DENIED.

DONE AND SIGNED at Alexandria, Louisiana, this 11th day of February, 1992.

/s/ Nauman S. Scott
United States District Judge

APPENDIX D

[Filed Apr. 30, 1992]

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 88-2099

JUDGE SCOTT

FRANK S. DEUS

-VS-

ALLSTATE INSURANCE COMPANY

RULING

Before the court is the Motion for Judgment as a Matter of Law Dismissing Plaintiff's Claims filed on behalf of defendant Allstate Insurance Company (Allstate.)

Frank Deus (Deus) filed suit against his former employer, Allstate, which resulted in numerous claims, most of which have been dismissed. Trial commenced on the remaining claims of breach of contract and intentional infliction of emotional distress. After close of plaintiff's case, defendant Allstate filed a Motion for Judgment as a Matter of Law. We have previously denied the motion with respect to the intentional infliction of emotional distress claim and address here only the breach of contract claim.

Deus has asserted that his employment contract consisted of the Allstate Agent Compensation Agreement

(Agreement), dated June 29, 1969 and signed by both Allstate and Deus, an Amendment thereto outlining employee complaint and termination procedures, undated and signed only by Allstate, and several other Amendments thereto effecting agent's commissions, all signed by Allstate, some of which are either not dated or not signed by Deus. Deus also contends that the Allstate policy manual constituted contractual obligations on Allstate's part.

Deus alleges that these documents entitled him to lifetime employment with Allstate unless his work was "unsatisfactory" and unless Allstate gave Deus notice and an opportunity to bring his performance up to satisfactory standards. Plaintiff further contends that he was "constructively terminated" by Allstate in breach of these alleged contractual obligations.

The Louisiana Civil Code does not provide for "constructive termination" or "constructive discharge." The Civil Code articles on "Hiring of Servants and Laborers" are brief and limited, and plainly set out Louisiana's employment Law. La. C.C. art. 2746-2750.

Nor does Louisiana's case law provide for constructive termination. In fact, not one single Louisiana case exists in the state court system which addresses the theory of constructive termination. Plaintiff has borrowed this phrase from federal civil rights cases and attempted to place it along side code articles which are incongruous.

The cases cited in plaintiff's opposition are, without exception, civil rights cases. Civil rights cases are one of the few exceptions to Louisiana's employment rules because of the nature of the cause of action. The Fifth Circuit has articulated a definition of "constructive discharge" in actions brought under Title VII of Civil Rights Act of 1964. *Calcote v. Texas Education Foundation*, 578 F.2d 95 (5th Cir. 1978). The term, in that context, requires that the employer engage in *illegal con-*

duct which forces an employee to resign. *Young v. Southwestern Savings and Loan Association*, 509 F.2d 140 (5th Cir. 1975), *Vaughn v. Pool Offshore Co., etc.*, 683 F.2d 922 (5th Cir. 1982). No allegation of a Title VII violation exists here. We hold that Deus' resignation of 1987 was not a constructive termination, but a voluntary and valid resignation. Accordingly, we deny plaintiff's claim for wrongful discharge.

Plaintiff also asserts a separate cause of action for breach of contract based on Provision XI of the Agreement, as set out in an amendment, regardless of the circumstances under which Deus left his employment. The amendment circumscribes the process for termination of an employee. Plaintiff alleges Allstate breached its obligation to fairly apply this contractual provision to Deus, and that it breached its own rules and regulations on how this provision must be applied to its agents.

The first problem with this claim is in the technical flaws of the amendments to the original Agreement. The original Agreement plainly sets out the requirements for amendment:

> XIV. This document contains the whole agreement between you and Allstate and it shall not be altered or amended except by an agreement in writing signed by you and by Allstate's authorized manager.

This provision is not buried in pages of legalese, but is the last provision of the Agreement, immediately above Deus' signature. The amendment upon which plaintiff's claim relies is an undated document entitled "Amendment to Allstate Agent Compensation Agreement," executed only by Allstate. Deus' name appears only on the upper left hand corner of the first page, typed. It is not signed by Frank Deus and therefore does not comply with the amendment requirement in the original Agreement. We hold that the amendment is not binding and Allstate is not contractually obligated to comply with its terms.

We are compelled, however, not to rest on this technical flaw, but to address the substantive shortcomings of plaintiff's breach of contract claims, generally. Even if Deus had been fired by Allstate, and even if the amendment in question had been valid, we would be required to hold this contract invalid.

The Louisiana Civil Code Section on Master and Servant has been revised recently, but the substantive law remains unchanged. The references herein to the Civil Code are to those articles in effect at the time the original agrement was executed. La. C.C. art. 164 essentially provides for three types of employment: employment-at-will, employment for a fixed time, and apprentices. Employment for a fixed time is specific. It provides that these servants are not considered as hired out, but "as having sold their services." La. C.C. art. 167 provides that employment contracts cannot be binding for a term longer than ten years. The Agreement between Deus and Allstate has no such limitation. This aspect is critical because any breach of contract claim must consider damages. A contract of employment for life is not enforceable. *Shaughnessy v. D'Antoni*, 100 F.2d 442 (5th Cir. 1939). Enforcement of a lifetime employment contract could give rise to damages impossible to calculate. Indeed, the Civil Code only contemplates two types of damages for breach of employment contracts: specific performance and recession. La C.C. art. 170. Mr. Deus has not petitioned the court for specific performance and recession is inapplicable to this case. Thus, the plaintiff's claim for a lifetime of wages is not provided for in the Civil Code. *Hill v. Missouri Pac. Ry. Co.*, 8 F.Supp. 80 (La. D.C. 1933). An employee with an unlimited term contract is considered an at-will employee.

While it is true that an employer may limit his right to terminate an otherwise "at-will" employee, this axiom has its own boundaries. The case law reflects a presumption against such unilateral limitations and has declared

them against public policy. *Pitcher v. United Oil & Gas Syndicate*, 139 So.2d 760, 761 (1932). The only circumstances under which an employer can make such a promise binding is if the agreement contains "mutuality." That is, an employee must give, in addition to the services which he promised to perform, a consideration; then he has in effect purchased, for valuable consideration, an option to keep the employment for the term specified, and such a contract is a valid one. 139 So.2d at 761.

Plaintiff has implied that his "purchase" of this limitation on Allstate's right to terminate was consummated in the contract when the company retained ownership of all accounts and set out its commission rates. Plaintiff claims that in the insurance business generally, an agent's "book" of business is owned by the agent. Allstate's contract, however, calls for all accounts secured by its agents to be the property of Allstate. Plaintiff claims that this ownership arrangement, together with his commissions which he asserts are lower than others in the insurance industry, constitute his "valuable consideration." We do not agree. These factors are so ingrained in the fabric of an insurance agent's job that it would be impossible to distinguish them as "additional to services" unless they were specifically designated as such. Indeed, these two factors go to the very nature of "services" and "compensation." We hold that Deus did not purchase the right to permanent employment from Allstate.

Plaintiff has made a plethora of less substantial contractual arguments, all of which must be denied. Plaintiff claims that Allstate's reduction of clerical support staff and telephone lines is in contravention of its contractual obligation to assist its agents "in every way possible" in attaining their goals. This assertion is not only unsupported by the facts but grossly misleading. The trial testimony reflects that Deus' Allstate office had one full time secretary until 1985. In an effort to respond to his agents' request for more help, Scott Raley,

Deus' immediate supervisor, hired a part-time secretary who only stayed briefly. She was not replaced due to the limited office budget. We note that Allstate did, in fact, make some reductions during the period in question in this office's budget. These reductions, however, reflected a per capita decrease for agents who had left. (Allstate had a longstanding formula to compute each office's budget, one factor of which was the number of agents in the office.) The trial testimony does not reflect that any telephone lines were ever cut, nor does the record reflect any other actual reduction in services or support provided by Allstate to its agents in Deus' office.

Deus' claim that Allstate promised what appeared to be endless assistance to its agents is also untrue. The language to which plaintiff refers is taken from a letter entitled "Introduction to Your Allstate Agent Compensation Agreement" at the beginning of the Agreement. The Agreement is divided into four parts. This introduction is not contained in any part, but is separate. It is in letter form and the language therein is extremely general. Additionally, it is signed only by Allstate, unlike the Agreement itself which is signed by both the agent and the company. This introductory letter was obviously not intended as part of the actual Agreement.

However, even if we were to construe this letter as part of Allstate's binding obligations, plaintiff has lifted a phrase out of context resulting in a wholly different statement. Plaintiff claims that the letter states that Allstate promises to assist its agents in every way possible to attain their goals. The exact language reveals that this is not what Allstate promised at all. The entire sentence is as follows:

> Through training programs and through guidance provided by the sales management team, we will assist you in every way possible in attaining your goals as an Allstate Agent both in terms of personal satisfaction and financial accomplishments.

Introduction to Your Allstate Agent Compensation Agreement.

This does not state that the company will "assist you in every way possible" without limitation, but clearly states that the assistance offered is restricted to training programs and guidance. Plaintiff referred to this specific provision in his Opposition to Allstate's Summary Judgment, page 38 wherein he quotes the passage set out above, but omits the limiting phrase by ellipsis. The letter does not promise unlimited support staff, unlimited telephone service and unlimited advertising, as plaintiff would have us believe.

Finally, plaintiff bases his breach of contract claim on "numerous oral representations" made to plaintiff by Allstate concerning "job security." Such claims are plainly precluded by the original Compensation Agreement which specifically disallows any amendment made without the requisite formalities. (Allstate Agent Compensation Agreement, Part Four, No. XIV.) This is also true of plaintiff's claim that through "custom and practice" Allstate somehow obligated itself to provide more support and assistance to Deus in his marketing efforts. First, as stated above, there is no evidence before the court that Allstate ever actually reduced any marketing or office support in Deus' office except to the extent the Allstate budget formula required per capita reductions for agents who had left. At best, Deus' supervisors may have threatened to make changes in the office which possibly could have adversely affected the agents. However, there was no evidence that any changes or reductions actually took place. Second, plaintiff relies on "custom and practice" cases which are factually distinguishable. For instance, plaintiff's reliance on *Roussel v. James U. Blanchard & Co., Inc.*, 430 So.2d 247 (La. App. 4th Cir., 1983) is unfounded. This case deals with an employment situation in which there is no contract, and the court looked to written or oral negotiations, us-

ages of business and, in general, the nature of the employment and its surrounding circumstances. The case at bar does not require us to institute such an extensive search for the terms of the employment contract. They are set out in the original Agreement and the properly executed amendments thereto. In fact, the contract specifically disallows such alterations.

Plaintiff has also alleged that Allstate's policy manual contains binding obligations on the part of the company. While it is true that there is some implication in Louisiana cases that in certain instances a policy manual may contain binding obligations on the part of an employer, *Wall v. Tulane University*, 499 So.2d 375 (4th Cir. 1986), *Morgan v. Avondale Shipyards*, 376 So.2d 516 (4th Cir. 1979), this is not the circumstance here. As noted above, with respect to several of plaintiff's breach of contract claims, the original Compensation Agreement requires that amendments thereto be signed by both parties. The policy manual was not so executed as to constitute an amendment. Additionally, and equally as important, the policy manual plainly states that it does not give rise to any obligations on Allstate's part. The policy manual even takes this disclaimer language one step farther by reserving the right to depart from the company's standard disciplinary procedures at its discretion. We hold that Allstate's Human Resources Policy Statements Manual is not a binding obligation on Allstate.

Accordingly, defendant's Motion for Judgment as a Matter of Law is hereby GRANTED with respect to plaintiff's breach of contract claim.

DONE AND SIGNED at Alexandria, Louisiana, this 29th day of April, 1992.

/s/ Nauman S. Scott
United States District Judge

APPENDIX E

[Filed Jul. 10, 1992]

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 88-2099

JUDGE SCOTT

FRANK S. DEUS

-VS-

ALLSTATE INSURANCE COMPANY

JUDGMENT

For written reasons this day assigned, we GRANT judgment in favor of defendant, Allstate Insurance Company, and against plaintiff, Frank S. Deus, dismissing this suit at plaintiff's costs.

Alexandria, Louisiana, this 10th day of July, 1992.

/s/ Nauman S. Scott
United States District Judge

[Judgment Entered 7-13-92]

APPENDIX F

[Filed Jul. 10, 1992]

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 88-2099

FRANK S. DEUS

-VS-

ALLSTATE INSURANCE COMPANY

NAUMAN S. SCOTT, United States District Judge.

OPINION

Before the court is the Motion of Allstate Insurance Company (Allstate) for judgment as a matter of law dismissing the claims of plaintiff, Frank S. Deus (Deus) on the issues of breach of contract, intentional infliction of emotional distress and prescription. We have granted the motion with respect to the breach of contract issue. We now address the issues of intentional infliction of emotional distress and prescription.

JURISDICTION

We have jurisdiction under 28 U.S.C. § 1332, diversity of citizenship.

PROCEDURAL BACKGROUND

I.

On August 15, 1988, Deus filed suit against Allstate, which eventually developed into various state law claims of which only the claim of intentional infliction of emo-

tional distress, breach of contract and the defense of prescription remained. The case commenced on April 6, 1992 before a jury on Deus' claims that defendant Allstate (1) breached its employment contract, and (2) intentionally inflicted emotional distress.

After plaintiff had rested his case, Allstate filed a Motion for Judgment as a Matter of Law to dismiss plaintiff's claims for breach of contract and for intentional infliction of emotional distress. Allstate later filed a supplemental memorandum raising the issue of prescription. The court granted the motion in part from the bench before the jury was charged dismissing the breach of contract claim and a written ruling on that issue signed by the court on June 15, 1992. The remaining issues were taken under advisement. The jury was charged on the issue of intentional infliction of emotional distress and returned a verdict in favor of plaintiff Deus on the issue of intentional infliction of emotional distress, awarding him $850,000.00 for lost income, past and future; $450,000.00 for pain and suffering, past and future; $40,000.00 for medical expenses, past and future; and $50,000.00 for disability, past and future, for a total award of $1,390,000.00. The court suspended the signing of a judgment and issued to both parties a briefing schedule on the pending motions.

Allstate's motion for judgment as a matter of law is filed pursuant to Fed. R. Civ. P. 50(a), previously termed "Motion for Directed Verdict and for Judgment Not Withstanding the Verdict." Paragraph (a)(1) of the new Rule 50 articulates the standard:

> If during the trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment on any claim. . . that cannot under the controlling law be maintained without a favorable finding on the issue.
>
> Fed. R. Civ. P. 50(a)(1).

Although this rule is new, the Notes of Advisory Committee on December, 1991 amendment of the rule are instructive in developing the standard for granting of such a motion: the new rule effects no change in the existing standard articulated in long-standing case law. Thus, we are compelled to consider prior cases under Rule 50 as binding authority.

Whether the evidence is sufficient to create an issue of fact for the jury is solely a question of law to be determined by the court. *U. S. for Use and Benefit of Weyerhauser Co. v. Bacon Constr. Co.*, 430 F.2d 420 (5th Cir. 1970). The standard in passing on that question is the same whether it arises in the procedural context of a motion for directed verdict or of a motion for judgment notwithstanding the verdict. *Lubbock Feed Lots, Inc. v. Iowa Beef Processors*, 630 F.2d 250, 269 (5th Cir. 1980). The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party. *Improvement Co. v. Munson*, 14 Wall (81 U.S.) 442, 448. 20 L.Ed. 867 (1871). Wright & Miller § 2524. In the Fifth Circuit, it has been firmly established that, in diversity cases, a federal test controls on the sufficiency of the evidence. *U.S. v. Williams*, 441 F.2d 637, 644 (5th Cir. 1971); *Pope v. Safeway Stores, Inc.*, 425 F.2d 1161 (5th Cir. 1970).

The federal standard of review for motions for directed verdict and for JNOV was succinctly set out in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*).

> [T]he court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the

> Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury.
>
> 411 F.2d at 374.

With these parameters in mind, we address each of the issues of Allstate's motion.

HISTORY

II.

Plaintiff Deus was employed by Allstate as an insurance salesman from 1968 until his retirement as of January 1, 1989. His last day in his office was actually August 17, 1987; thereafter until January 1, 1989 he was on medical leave.

Traditionally before January 1, 1985, Allstate had two types of agents, Sears agents and company office agents (COAs). Sears agents usually were newly hired sales agents, in training at booths in Sears stores. COAs were trained agents, assigned in groups to large offices leased and run by Allstate. Each COA office expenses were paid for by Allstate, under a standard budget formula involving the dollar amount of sales production and the number of agents in each office.

State Farm Insurance, Allstate's chief competitor, by contrast had established its agents with great success in individual offices throughout the community. To meet this competition Allstate initiated the "neighborhood office agent" (NOA) program.

It was Allstate's intention to saturate the market geographically with many one-agent "neighborhood" offices.

The plan was to invite existing COAs to voluntarily become NOAs, as well as to hire NOAs as direct hires. Because market saturation was the purpose of the new plan, it necessarily follows that Allstate intended to hire an inordinate number of new agents. In an effort to induce agents to join what Allstate considered a winning program for all concerned, it offered incentives. The NOA agents would be "entrepreneurs," having control over their own offices. Although Allstate retained the right to approve some aspects of the NOA offices, operational control of each office was retained by the individual NOAs. NOAs could open their own office, or go into partnership with other NOAs. They had complete discretion over office staff and expenses such as office furniture and automobiles. Allstate reimbursed NOAs for their expenses by a formula weighted to new business, similar to that applied to company offices. NOAs could finance themselves above the formula if they chose to do so. As an additional incentive, NOAs were allowed to do certain types of advertising which COAs had never been allowed to do, such as yellow pages advertising. The NOA program was introduced by Allstate to the agents in 1984 but did not become effective until January 1, 1985. COAs were encouraged in every legitimate way possible to join the program which Allstate believed would be highly profitable for both the agents and the company. There is absolutely no evidence that Allstate had any other motive for adopting and promoting this plan.

III.

In May, 1985, Scott Raley (Raley) became Deus' immediate supervisor in the Lafayette company office on Felecie Street. Like all other COAs, Deus was urged to change his status voluntarily from COA to NOA. He was asked to do so by Raley, as well as Dusty Rhodes, his territorial sales manager and Dave Blakenhorn, his district manager in Jackson, Mississippi. He agreed to "look

at it" but never formally responded; he continued in his capacity as a COA.

Deus' problems at Allstate began in 1985, when he was put on "work program," the method by which Allstate sales agents are motivated to improve unsatisfactory performance. Phase 1 is "unsatisfactory work", Phase 2 is "corrective review" and Phase 3 is "job in jeopardy", leading to termination. The stages are determined by an agent's immediate supervisor performing a peer group analysis. These analyses are completed by grouping an agent with other agents in a similar competitive atmosphere (his peers) and comparing his sales figures with the sales figures of the other members of the group. No standard formula for determining the membership of the group existed in the Allstate Policy Manual, and formation of each such group was accomplished essentially at each supervisor's discretion. Peer group analyses were new in 1985, and its development was evolutionary in nature and coincided with the institution of the NOA program which began in January, 1985.

The Allstate rules have a built-in safety check so no one supervisor can single handedly put an agent through the work program for poor performance. Each phase of the work program must be reviewed and approved at a higher management level; terminations have to be approved by the corporate headquarters in Chicago.

Deus was first placed on the work program in August, 1985, and once again in the Spring of 1987. Deus claims that Raley "targeted" him and placed him on the work program unfairly by manipulating his peer group so that his production looked worse than it actually was. His final corrective review came in the Spring of 1987, when Raley put Deus on corrective review, based on a March 31, 1987 three member peer group analysis consisting of Deus and the other two agents in Deus' office. Raley gave Deus ninety days in which to equal the average sales in selected lines achieved by the other two agents in Deus'

office, for the quarter ending March 31, 1987. Deus' deadline was issuance of the July, 1987 "E" list. The "E" list was a computer printout of quarterly production, up to and including June 30, 1987. Because of the obvious lag time it takes to enter the figures into the computer, the list is dated July 2, two days after the end of the quarter.

When the list was printed, Raley realized that the numbers reflected that Deus was two automobile policies short of his quota. Raley knew that Deus had, in fact, sold these policies, but they had not been included in the statistics because they were still in the underwriting department, and thus, technically, not final. Raley did not have the authority to change the official figures on the list, but did recommend to his superiors that these two policies be included so that Deus could be removed from the work program. Because Deus was not officially removed from the work program, Raley was required by Rhodes, his supervisor, to draft a letter placing Deus on the next level, job in jeopardy. Raley wrote the letter and placed it in the file. He also recommended that the two automobile policies be included in the June 30, 1987 printout list so that Deus could be removed from the work program and sent it, along wtih Deus' statistics, to his superiors in Jackson, Mississippi for approval.

Raley subsequently obtained approval to remove Deus from the work program, and wrote a memorandum to that effect on August 11, 1987, which he gave to plaintiff. A few days later, on August 17, 1987, Deus alleges that he had an argument with Raley in Raley's office on the subject of his August, 1987 work program. Although Deus terms it a "little hassle", it might have been more serious since Deus left the office upset and never returned.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

IV.

The case law in Louisiana for this tort is scarce; however, we have the advantage of a recent Louisiana Supreme Court case, directly on point, *White v. Monsanto Co.*, 585 So.2d 1205 (La. 1991). This case "affirm[s] the viability in Louisiana of a cause of action for intentional infliction of emotional distress, generally in accord with the legal precepts set forth in the Restatement text and comments." *Id.* at 1209.

The elements required to prove intentional infliction of emotional distress, as set out by the court in *White v. Monsanto,* are lengthy but worth noting here.

> Thus, in order to recover for intentional infliction of emotional distress, a plaintiff must establish (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct.
>
> The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities.
>
> . . .
>
> [M]any of the cases have involved circumstances arising in the workplace.
>
> . . .
>
> [C]onduct which may otherwise be extreme and outrageous, may be privileged under the circum-

stances. Liability does not attach where the actor has done no more than to insist upon his legal rights in a permissible way, even though he is aware that such insistence is certain to cause emotional stress. restatement, *supra*, comment g, § 46. Thus, disciplinary action and conflict in a pressure-packed workplace environment, although calculated to cause some degree of mental anguish, is not ordinarily actionable. Recognition of a cause of action for intentional infliction of emotional distress in a workplace environment has usually been limited to cases involving a pattern of deliberate, repeated harassment over period of time.

. . .

The distress suffered must be such that no reasonable person could be expected to endure it.

White v. Monsanto, 585 So.2d at 1209, 1210 [citations omitted].

V.

On this issue the jury was charged as follows:

Deus' second claim is for the tort of intentional infliction of emotional distress. In order to recover for intentional infliction of emotional distress, Deus must prove that:

(1) the conduct of Allstate was extreme and outrageous;

(2) that the emotional distress suffered by the plaintiff was severe; and

(3) that Allstate desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from Allstate's conduct.

An outburst of vile, profane, or embarrassing language directed at an employee by a superior in the course of 'dressing him down' or motivating him—

even if it is crude, rough and uncalled for—does not amount to extreme and outrageous conduct giving rise to recovery for intentional infliction of emotional distress. Every employer must on occasion review, criticize, demote, transfer, and discipline employees. It is not unusual for an employer, instead of directly discharging an employee, to create unpleasant and onerous work conditions designed to force an employee to quit. Even if you find that such conduct existed in this case, while it may be deplorable, it is not the sort of conduct that, by itself, constitutes 'extreme and outrageous' conduct necessary to prevail on a claim for intentional infliction of emotional distress.

In order to be considered outrageous and extreme, conduct must go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Furthermore, the distress which is caused by the defendant's conduct must be such that no reasonable person could be expected to endure it.

There has been evidence presented that the plaintiff was particularly susceptible to emotional distress. Mr. Deus must prove that he has suffered damages and that the defendant's act or fault caused or resulted in those damages. Such proof must be shown to a legal certainty and by a reasonable preponderance of the evidence; a mere possibility is insufficient.

Additionally, unless Allstate knew of Mr. Deus' predisposition of emotional distress, then their actions must be evaluated according to the effect their conduct would normally have on a person or ordinary sensibilities. In other words, if Allstate did not know of Mr. Deus' predisposition, then you should not consider his condition when assessing liability.

Mr. Deus also must prove that Allstate's fault caused the damages claimed; when Mr. Deus fails

to prove this cause-in-fact element, he is not allowed to recover damages, even though he may have proved Allstate's fault. The mere fact that an employer knows that the employee will regard the conduct as insulting or will have his feelings hurt is not enough. Unless Allstate had knowledge that Mr. Deus would be particularly susceptible to suffering emotional distress as a result of its conduct, Allstate's conduct should be judged on the effect that conduct would have on a person of ordinary sensibilities.

If you find that Allstate knew that Frank Deus was particularly susceptible to emotional distress, then that may be considered as a factor in determining whether Allstate's conduct was extreme and outrageous.

Moreover, conduct which ordinarily would be considered extreme and outrageous may be privileged under the circumstances. In order to be privileged you must find that Allstate simply exercised its legal right in a permissible way, even if Allstate knew their actions would cause Deus emotional stress.

VI.

It is the burden of Deus to prove by a preponderance of the evidence that each incident of which he complains was done by Allstate for the specific purpose of causing Deus specifically, and only Deus, emotional distress. It is not enough to complain of annoyances, inconveniences, discourtesies or stresses which are encountered or suffered in common with other agents. Deus must prove that he was singled out, that he was targeted by Allstate and that each act was performed by Allstate with the specific intent of causing him, Deus, emotional distress. *Wilson v. Monarch Paper Co.*, 939 F.2d 1138 (5th Cir. 1991); *Dean v. Ford Motor Credit Co.*, 885 F.2d 300 (5th Cir. 1989).[1]

[1] Although the cases cited herein are based on a Texas state law cause of action for intentional infliction of emotional distress, we

Nor is it sufficient to prove that some other Allstate agent at some other time, some other place and some other circumstances was targeted by some other Allstate supervisor.

It should be borne in mind also that Allstate had adopted a new and radically different merchandizing strategy governing the sales of its policies. The reorganization and revisions involved in the NOA program were foundational in nature and the establishment of new agents, new office organizations, new financing, new techniques were still being established when the acts complained of by Deus occurred. The stresses and strains of this nationwide reorganization were still present. Although Allstate, because of the success of its competitor, State Farm, was assured of success, many of its agents, like Deus, were reluctant to abandon the merchandizing structure to which they were accustomed.

It is the burden of Deus to prove by a preponderance of the evidence that each incident of which he complains was so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, acts to be regarded as atrocious and utterly intolerable in a civilized community. Mere insults, indignities, threats, annoyances, petty oppression or other trivialities are not enough. None of the acts of which Deus complains even approaches the characterizations mentioned above. Indeed, none of them are more serious than annoyances, petty oppression or other trivialities.

VII.

Dues was a sick man long before the inception of the NOA program. His perception of the wrongs that he alleged against Allstate must be considered in the light of his pre-existing medical problems. He had a long history

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find them instructive. Both the Louisiana and Texas cause of action rely heavily on § 46 of the Restatement (Second) of Torts. *White v. Monsanto*, 585 So.2d (La. 1991); *Wilson v. Monarch Paper Co.*, 939 F.2d 1138 (5th Cir. 1991).

of tinnitus (ringing of the ears) which far outdated and outweighed any problems he had at Allstate. His medical records reflect that he sought treatment for this condition as early as 1980. Deus' expert witness, Dr. Charles I. Berlin, Director of the Hearing Research Laboratory at LSU Medical Center described the sound as extremely high frequency, and likened it to "the screeching of chalk or fingernails on a blackboard all day long." He stated unequivocally that tinnitus is not caused by stress, but that as stress increases, the tinnitus becomes less and less tolerable. He likened the condition to a dripping faucet. "At 8 a.m., it is not a bother when you are getting up and going about your business. But at three o'clock in the morning, it is irritating; if you happen to be having a bad night, it is worse—sort of a vicious circle." Dr. Berlin's assessment of Deus' condition was that "that much tinnitus could disable almost anybody, and in view of his self-report that he had this personality disorder, I felt he was beyond the means of coping with it."

Dr. Berlin noted that Deus had also presented himself as having "bipolar syndrome" (manic depression). Although Dr. Cloyd, Deus' psychiatrist, revealed that this is a "psychological" illness with a "neurochemical cause", plaintiff's primary treating professional, Frank T. Friedberg, was not a psychiatrist but a psychologist. Dr. Friedberg's history of Deus reveals that plaintiff had experienced depressive episodes since the age of 12. Dr. Friedberg opined that Deus "probably has an inherent tendency toward bipolar disorder, but stress reveals it." He testified that manic depression results from a genetic predisposition, and it can arise for no reason at all, although it often arises from "life stresses". These stresses are not limited to the work place, but can be caused by other factors, such as the stress caused by tinnitus over a period of years, or stress from surgery undergone by plaintiff in 1986. Dr. Friedberg also noted that some time in the past, stress had caused Deus to lose all his

hair. This hair loss occurred long before the beginning of plaintiff's problems with Allstate.

Deus was given medication for his depression from 1986. He saw Dr. Cloyd for his manic depressive condition approximately 14 times for various medications in five years. Dr. Cloyd verified Dr. Friedberg's history on plaintiff. Deus had "prior clinical depression before, just to a lesser degree." Dr. Cloyd also confirmed that this manic-depressive state, or bipolar disorder, can arise spontaneously, without provocation. Generally Dr. Cloyd's impression of Deus was that he was depressed and frustrated. His notes of October 15, 1987 indicate that Deus told him that he knew the company (Allstate) was changing and he "understood the nature of the changes" but that he "got pissed."

Further, Deus testified that he considered his medical condition to be private information and that he deliberately and consciously withheld from Allstate any information regarding his medical problems. He never mentioned his bipolar disorder, nor did he ever explain the unusual intensity of his tinnitus, or that he was under physician's care and/or on medication. Therefore, Allstate's alleged actions must be evaluated according to the effect their conduct would have on a person of ordinary sensibilities.

VIII.

In support of his claim that Allstate is guilty of intentional infliction of emotional distress, Deus articulates the following alleged tortious conduct on Allstate's part: Deus' work program of 1987, his argument with Raley on August 17, 1987, the "hire-hire-hire" incident, potential competition from NOAs, inadequate clerical staff, inadequate telephone answering staff, inability to advertise and the omission of the telephone number of Allstate's Lafayette area office from the telephone book one year.

A. Deus complains that the 1987 evaluation was unfair because medical insurance policies had not been used in the evaluation. However, medical insurance had been especially unprofitable for Allstate. It was so unprofitable, in fact, that Allstate has discontinued it all together. The purpose of placing Deus on work program was to encourage and to motivate him to improve his sales performance. It is certainly reasonable for the company to attempt to focus its sales agents on areas which are most profitable to the company. It is also reasonable for Raley to reflect that interest. We find his act to be consistent with a reasonable business practice of incentives. At trial, Deus testified that he knew that he was "in big trouble" because his "production was down".

Deus alleges that the peer group for his 1987 evaluation was unfair because its membership was not identical to his peer group of 1985. He described his reaction to this as being "devastated", "miserable", and "apprehensive". We cannot follow with this reasoning. As we have stated previously, the use of peer groups was fairly new to Allstate; they were used for many purposes including corrective review. They were evolutionary in nature and as Allstate gained experience in their use, they became more tailored to their various purposes. For instance, the peer group in Deus' corrective review in July of 1985 was composed of all 13 agents in the Lafayette market area. In addition to Deus, this group included COA agents from Crowley and Opelousas as well as newly converted NOA agents. It could not be assumed that the competitive atmosphere and the opportunities encountered by agents in Crowley and Opelousas were identical to those encountered by Deus in his Lafayette office in 1985 or 1987. It would be an even more ridiculous assumption to assert that the competitive conditions and opportunities of NOA agents are identical to those encountered by Deus in the COA office in 1987. The peer group for Deus' 1987 evaluation was limited to the three COA

agents in his Lafayette office: Deus, Barron and LeDoux. This was the peer group for Deus, for Barron and for LeDoux. It was not formed specifically for Deus. They were all operating under absolutely identical conditions in the same office in Lafayette. All were COA agents. We cannot imagine a more appropriate group for the purpose of corrective review. Was use and membership of the 1987 peer group so outrageous as to go beyond the bounds of decency? With all reasonable inferences in favor of Deus, we think not.

B. Deus alleges as another element of his tort claim that Raley spoke to him in a rude, unpleasant manner on his last day of work. Deus described this confrontation as "a little hassle" which lasted several minutes. Even if we view the evidence in a light most favorable to the non-moving party, we would have to hold in favor of the defendant, Allstate.

Indeed, if plaintiff had characterized this confrontation in much more extreme terms, the incident would still not rise to the level of tortious conduct under *White v. Monsanto, supra.* In that case, the Louisiana Supreme court specifically stated that "[l]iability does not extend to mere insults, indignities, threats, annoyances . . ." and "[n]ot every verbal encounter may be converted into a tort; on the contrary, some 'safety valve must be left through which irascible tempers may blow off relatively harmless steam.' Restatement, *supra*, comment d, § 46; Prosser and Keaton, The Law of Torts, § 12, p. 59 (5th ed. 1984)." *White v. Monsanto* at 1209. Louisiana law grants Raley an irascible temper.

C. The "hire—hire—hire" expression is an excerpt from a note by Raley at an accountability meeting and was produced by Allstate on discovery, Exhibit P-32. This note is undated and neither Raley or any other witness could supply the date of the meeting. From the content of the note it would appear that the meeting was

simply an administrative meeting between supervisors and their superiors. The reference apparently was to the plan to hire many more new agents for the NOA program. These words "hire—hire—hire" were repeated time and time again throughout the trial by plaintiff's counsel as conclusive evidence of Allstate's intent to inflict emotional distress. How did these words inflict emotional distress on Deus? Nothing was said about Deus. Deus' testimony is absolutely free of any reference to "hire—hire—hire" and there is absolutely no evidence that Deus or any other agent attended this meeting. Nor is there any evidence that Deus ever knew of this phrase until Exhibit P-32 was produced by Allstate. Is Raley's act in making this note to be regarded as atrocious and utterly intolerable in a civilized community? With all reasonable inferences in favor of Deus, we think not.

D. Deus stated that he feared Allstate's employment of additional NOAs because of the potential of their moving near his office in competition with him. We do not understand this contention since Deus had peaceably survived the competition of four other COAs *in the same office* with him for a matter of years. Is Allstate's plan to hire additional NOAs to be regarded as atrocious and utterly intolerable in a civilized community? With all reasonable inferences in favor of Deus, again, we think not.

E. Finally Deus complains of inadequate clerical staff, inadequate telephone answering staff, inability to advertise and the fact that the telephone number of Allstate's Lafayette marketing area office was omitted one year from the telephone directory. We discuss these in the order in which they appear:

Inadequate clerical staff. Deus complains that the clerical staff was reduced to an inadequate level. Prior to the establishment of the NOA program, Deus' office housed five COA agents. Under Allstate's formula, the five

agents are entitled to two secretaries. Two of those COAs left to become NOAs. Under the same formula, the remaining three COAs were entitled to only one secretary. The reduction was dictated by the reduced population in the office, not by any change in formula by Allstate.

Inadequate telephone answering staff. Deus complains that he repeatedly had to answer the telephone, as did the other agents, when his secretary was away from her desk. Since the answering of telephones was a secretary's duty, the reduction in telephone answering staff has been discussed immediately above. It is possible also that the amount of telephone staff might have been increased by newly employed NOA agents seeking instructions from the two supervisors who occupied a separated part of the office.

Inability to advertise. Deus complains that he was unfairly prohibited from engaging in certain types of advertising in which NOAs were allowed to engage. This involves no act by Allstate. Deus, like all COAs, had never been allowed to advertise.

Omission of the telephone number of Allstate's Lafayette area office from the telephone book one year. The evidence shows that the telephone listing for the Felecie Street company office was omitted one year but there is absolutely no evidence as to how or why it happened. We find it obvious that no targeting of Deus was involved in this occurrence.

Were any of these acts so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and can any of them be regarded as atrocious and utterly intolerably in a civilized community? Again, with all reasonable inferences in favor of Deus, we think not.

CONCLUSION

Having considered all the evidence in this case on Deus' allegation that Allstate was guilty of intentionally inflicting emotional distress upon Deus and having considered that evidence in the light and with all reasonable inferences most favorable to Deus, we find that this case borders on the frivolous; that Deus was not targeted or singled out by Allstate; that the acts which were the subject of Deus' complaints were either petty annoyances or trivialities, some of which were connected to the massive reorganization involved in the establishment of the NOA program; that Allstate had every right to install the NOA program and the adoption of that program was to meet the competition of Allstate's chief competitor, State Farm Insurance Company, and not for the purpose of intentionally inflicting emotional distress on the plaintiff, Deus. We find, in addition, that none of the acts which were the subject of Deus' complaints were so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and that none of them could be regarded as atrocious and utterly intolerable in a civilized community. Allstate's motion for a judgment as a matter of law dismissing the claim of plaintiff, Frank S. Deus, on the issue of intentional infliction of emotional distress is GRANTED.

Allstate's motion for judgment as a matter of law dismissing plaintiff's claim on the issue of intentional infliction of emotional distress having been granted, we find it unnecessary to consider and we decline to consider that motion on the issue of prescription.

Alexandria, Louisiana, this 10th day of July, 1992.

/s/ Nauman S. Scott
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 88-2099

JUDGE SCOTT

FRANK S. DEUS

-VS-

ALLSTATE INSURANCE COMPANY

ORDER

On motion of Allstate Insurance Company, through its attorney, Dona J. Dew; it is

ORDERED that 15th Judicial District Court for the Parish of Lafayette, State of Louisiana, be temporarily enjoined from proceeding further in Civil Action No. 88-4527, Section D on the docket of that court pending resolution of this matter before the Fifth Circuit Court of Appeals, pursuant to Fed. R. App. P. 8(a) and 28 U.S.C. § 2283; it is further

ORDERED that Frank Deus be and he is hereby permanently enjoined in pursuing any additional claims against Allstate, its employees, agents, officers, successors or assigns based upon the issues which have been presented and resolved in this litigation.

Alexandria, Louisiana, this 2d day of September, 1992.

/s/ Nauman S. Scott
United States District Judge

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4795, 92-4995,
92-5069, 92-5294 & 93-5226

FRANK S. DEUS,
Plaintiff-Appellant,

versus

ALLSTATE INSURANCE CO.,
Defendant-Appellee,

VOORHIES & LABBÉ,
Intervenor-Appellant.

FRANK S. DEUS,
Plaintiff,

versus

ALLSTATE INSURANCE COMPANY,
Defendant-Appellee,

versus

NATIONAL NEIGHBORHOOD OFFICE AGENTS' CLUB, INC.,
and RANDY J. LANE,
Movants- Appellants.

FRANK S. DEUS,
Plaintiff-Appellant,

versus

ALLSTATE INSURANCE CO.,
Defendant-Appellee,

FRANK S. DEUS,
Plaintiff-Appellant,
Cross-Appellee,

versus

ALLSTATE INSURANCE CO.,
Defendant,

versus

VOORHIES & LABBÉ,
Intervenor-Appellee,
Cross-Appellant.

FRANK S. DEUS,
Plaintiff-Appellant,

versus

ALLSTATE INSURANCE CO.,
Defendant-Appellee,

Appeal from the United States District Court
for the Western District of Louisiana

ON PETITIONS FOR REHEARING

(April 5, 1994)

Before HENDERSON *, SMITH and EMILIO M. GARZA, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

The motion of intervenor to file petition for rehearing out of time is GRANTED. That petition for rehearing also is DENIED.

ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

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* Circuit Judge of the Eleventh Circuit Court of Appeals, sitting by designation.

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Docket Number: 88-2099

JUDGE SCOTT

MAGISTRATE METHVIN

FRANK S. DEUS

versus

ALLSTATE INSURANCE COMPANY

PLAINIFF'S THIRD SUPPLEMENT AND AMENDING PETITION

NOW INTO COURT, through undersigned counsel, comes plaintiff, Frank Deus, who desires to amend and/or supplement his original complaint, by adding the following paragraphs, to-wit:

1.

By adding as paragraph 13 to the original petition, the following:

13.

Allstate Insurance Company, through its managers, including Raley, Rhodes, Artigues, and Blankenhorn, specifically, deliberately, maliciously and intentionally manipulated, fabricated, and falsified plaintiff's "peer groups", to make it appear as though plaintiff's work was unsatisfactory when, in fact, it was not. Additionally, Allstate through its managers, Raley, Rhodes, Artigues, and Blankenhorn, used these false and fabricated "peer groups"

to fraudulently and/or in bad faith place plaintiff on "corrective review" and on "job-in-jeopardy".

2.

By adding as paragraph 14 to the original petition, the following:

14.

Specifically, in 1985, Allstate placed Frank Deus on corrective review contrary to its policies and procedures, when Frank Deus was not actually deserving of this treatment. Thereafter, in 1986, Allstate again manipulated, changed and falsified its peer groups, and threatened Frank Deus with corrective review, when he was not actually last in his true peer group.

Finally, in 1987, Allstate deliberately, intentionally, and maliciously falsified and misrepresented data to falsely make it appear that Frank Deus was last in his peer group, to permit his placement on corrective review, in violation of his contract. Subsequent thereto, Allstate maliciously and intentionally and/or recklessly placed Frank Deus on job in jeopardy, based upon falsified and fabricated data and/or results, and placed Frank Deus on job in jeopardy, contrary to Frank Deus' contract and/or Allstate's policies and procedures, rules and regulations.

3.

By adding as paragraph 15 to the original petition, the following:

15.

Additionally, in an effort to intentionally, deliberately, maliciously, recklessly, and severely emotionally harass and distress Frank Deus, Allstate Insurance Company, through its managers, took numerous actions, such as cutting back on previously promised, and contractually obligated secretarial help; forcing

Frank Deus to act as a "secretary" for the managers in his office; surrounding Frank Deus' company office with NOA offices to "squeeze" Frank Deus out of the company office, and severely restrict Frank Deus' ability to produce business; made numerous threats to plaintiff about his job; and took numerous other actions, which will be shown at the trial of this matter. These actions amounted to a bad faith breach of Frank Deus' employment contract with Allstate, as well as a fraud on Frank Deus and intentional infliction of emotional distress, through either deliberate, intentional actions, or actions so reckless, wanton and wilful that they rise to the level of intentional tort.

WHEREFORE, plaintiff prays that it be permitted to file and serve this Third Supplemental and Amending Petition, that, after proceedings had, this Third Supplemental and Amending Petition be deemed good and sufficient, and that, there be judgment on this petition and on all previous petitions, in his favor, against Allstate, taxing Allstate with all costs of these proceedings, and for all other legal, general, and equitable relief.

Respectfully submitted,

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By: /s/ H. Lee Leonard
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By: /s/ Keitha A. Leonard
KEITHA A. LEONARD
Attorneys for Frank S. Deus

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Docket No. 88-20[illegible]

JUDGE SCOTT
MAGISTRATE METHVIN

FRANK S. DEUS

versus

ALLSTATE INSURANCE COMPANY

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY that I, counsel for plaintiff, FRANK S. DEUS, have notified opposing counsel of our intent to file a Third Supplemental and Amending Petition and opposing counsel has refused to consent to the filing and granting of such motion.

Lafayette, Louisiana, this 9th day of January, 1992.

/s/ Keitha A. Leonard
KEITHA A. LEONARD

APPENDIX J

15TH JUDICIAL DISTRICT COURT
LAFAYETTE PARISH, LOUISIANA

Docket No. 88-4527-D

FRANK DEUS

versus

ALLSTATE INSURANCE COMPANY, *et al*

PLAINTIFF'S FIRST SUPPLEMENTAL AND AMENDING PETITION

NOW INTO COURT, through undersigned counsel, comes Plaintiff, Frank Deus, who amends his original petition in the following manner, to wit:

I.

Plaintiff desires to add the following to Paragraph 1 of the original "Petition for Damages":

Made additional defendants herein are:

(a) SCOTT RALEY, a person of the full age of majority and a resident of Shreveport, Louisiana, who may be served at Allstate Insurance Company, 1945 E. 70th Street, Suite C, Shreveport, Louisiana, 71105.

(b) LARRY "DUSTY" RHODES, a person of the full age of majority and a resident of Baton Rouge, Louisiana, who may be served at 3636 South Sherwood Blvd., Suite 100, Baton Rouge, Louisiana, 70816; or, 18333 Wildlife Way, Baton Rouge, Louisiana, 70817.

II.

Plaintiff desires to add the following as Paragraph 13 to the original "Petition for Damages":

Throughout the years 1985 through 1987, Scott Raley and Larry "Dusty" Rhodes were managers employed by original defendant, Allstate Insurance Company. Throughout the years 1985 through 1987, Raley and Rhodes, in conjunction with defendant Allstate, and with the full authority and approval of other managers within the Allstate system, took specific actions to defraud Plaintiff, in violation of Plaintiff's employment contract with Plaintiff, and in violation of Plaintiff's rights under the applicable tort laws of Louisiana.

III.

Plaintiff desires to add the following as Paragraph 14 to the original Petition:

While in the employment of Allstate, Frank Deus was a "company office agent", and had a specific contract with Allstate, which provided that Allstate could not terminate Plaintiff's employment with Allstate for unsatisfactory work unless Plaintiff's work was, in fact, truly unsatisfactory, and Allstate first notified him that his work was unsatisfactory, and gave him a "reasonable opportunity" to bring his work up to satisfactory levels. If, in fact, Plaintiff was able to bring his work up to satisfactory levels, Allstate could not terminate Plaintiff's employment.

IV.

Plaintiff desires to add the following as Paragraph 15 to the original Petition:

The system whereby Allstate evaluated Plaintiff under his contract for unsatisfactory work, and gave Plaintiff notice that his work was unsatisfactory, was called the peer group system and corrective review procedure.

V.

Plaintiff desires to add the following as Paragraph 16 to the original Petition:

Defendants Raley and Rhodes, in conjunction with other managers within the Allstate system, and in conjunction with defendant Allstate, specifically manipulated the Allstate peer group system, to falsely make it appear as though Plaintiff's work was unsatisfactory, and that Plaintiff was deserving of corrective review and termination for unsatisfactory work when, in fact, he was not.

VI.

Plaintiff desires to add the following as Paragraph 17 to the original Petition:

Specifically, in the first quarter of 1987, Raley, Rhodes and Allstate changed, manipulated and falsified Plaintiff's peer group, taking out other agents who had previously been measured against Plaintiff, in violation of Allstate's established rules and procedures, with the specific intention of making sure that Plaintiff's work production appeared lower than other agents in his peer group, to falsely make it appear as though Plaintiff's work production was unsatisfactory, and that Plaintiff was deserving of corrective review and termination for unsatisfactory work.

VII.

Plaintiff desires to add the following as Paragraph 18 to the original Petition:

After manipulating and falsifying Plaintiff's peer group, for the purpose of targeting Plaintiff for corrective review and termination, defendants Raley and Rhodes and Allstate placed Plaintiff on corrective review. Since the corrective review was based on a falsified peer group system, this placement was in direct violation of Plaintiff's employment contract with Allstate, and in violation of All-

state's own practices, procedures, and standards for its peer group system and corrective review system, and was in fact, a fraud on Plaintiff.

VIII.

Plaintiff desires to add the following as Paragraph 19 to the original Petition:

After placing Plaintiff on corrective review on the basis of a manipulated and falsified peer group, Allstate threatened Plaintiff with termination. Plaintiff was thereafter constructively terminated by Allstate, as a result of Allstate's fraud upon Plaintiff.

IX.

Plaintiff desires to add the following as Paragraph 20 to the original Petition:

Allstate, Raley and Rhodes defrauded Plaintiff by manipulating and falsifying his peer group in 1987, and by placing Plaintiff on corrective review and constructively terminating Plaintiff.

X.

Plaintiff realleges and reavers any and all previous allegations of the original Petition, as if copied in extenso.

XI.

Plaintiff further requests trial by jury on all issues triable by jury.

WHEREFORE, premises considered, Plaintiff, FRANK S. DEUS, respectfully prays that this, Plaintiff's First Supplemental and Amending Petition, be deemed good and sufficient, and further prays that Defendants, ALLSTATE INSURANCE COMPANY, SCOTT RALEY and LARRY RHODES be duly cited and served, and after due proceedings are had, judgment be rendered in favor of Plaintiff, FRANK S. DEUS, and against Defendants,

ALLSTATE INSURANCE COMPANY, SCOTT RALEY and LARRY RHODES, with legal interest and at the cost of Defendants, and for all other legal, general and equitable relief.

Plaintiff further prays for trial by jury.

Respectfully submitted,

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By: /s/ Keitha A. Leonard
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Attorneys for Plaintiff

OCT 3 1994

No. 94-32

IN THE
Supreme Court of the United States
October Term, 1994

ALLSTATE INSURANCE COMPANY,
Petitioner,

v.

FRANK S. DEUS AND

VOORHIES & LABBÉ,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On August 15, 1988, Frank Deus ("Deus"), a Louisiana citizen, filed suit against Allstate Insurance Company ("Allstate"), an Illinois citizen, in the U.S. district court for the western district of Louisiana invoking diversity jurisdiction under 28 U.S.C. § 1332. On the same day, Deus filed suit against Allstate in the Fifteenth Judicial District Court, Lafayette Parish, Louisiana. (Appendix of Original Petition at 6a.) Deus did not serve the state court petition but instead proceeded to litigate his federal court action in the U.S. district court. (Appendix of Original Petition at 6a-7a.)

More than three months before trial in the district court, Deus moved to amend his federal court complaint to add a separate and additional cause of action for fraud. (Appendix of Original Petition at 72a.) Allstate opposed the amendment, (Appendix 1a-7a), and the district court refused the amendment and thus denied the presentation of this additional cause of action in federal court. (Appendix of Original Petition at 39a.)

On March 24, 1992, Deus served both his original state court petition and an amended and supplemental state court petition. (Appendix of Original Petition at 76a.) The latter contained the fraud claim like that Deus had attempted to present in the district court. (Appendix of Original Petition at 76a.)

The district court subsequently disposed of Deus' claims against Allstate in Allstate's favor. (Appendix of Original Petition at 37a.) Deus appealed. While the appeal was pending, Allstate returned to federal district

court and obtained an injunction against the state court proceedings as to all Defendants on all claims (Appendix of Original Petition at 68a.) The district court's decision to enjoin the state court proceedings was thereafter made part of Deus' appeal to the fifth circuit.

The fifth circuit affirmed the district court's injunction against Deus' state court case to the extent it was directed to claims the district court had actually decided. However, the fifth circuit overturned the injunction as it applied to Deus' fraud claim. The fifth circuit reasoned that this Court's decision in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), limited the district court's power to enjoin subsequent state court litigation to only those issues the district court actually decided. (Appendix of Original Petition at 33a.) On April 5, 1994, the fifth circuit denied Allstate's petition for rehearing on that issue.

ARGUMENT

Examination of the fifth circuit's ruling is limited to whether the trial court's injunction was permissible under the relitigation exception of the Anti-Injunction Act, 28 U.S.C. § 2283 ("Act"). Allstate misinterprets the fifth circuit's decision to reverse the district court's injunction of Deus' state court fraud claim. Contrary to Allstate's contentions, the fifth circuit did not reject the res judicata component of the Act. Neither did it disagree with the ninth circuit's decision in *Western Systems, Inc. v. Ulloa*, 958 F.2d 864 (9th Cir. 1992), *cert denied* __ U.S. __, 113 S.Ct. 970 (1993). And, finally, it correctly interpreted *Chick Kam Choo* by not concluding collateral estoppel precluded Deus from litigating his fraud claim in state court.

I. THE FIFTH CIRCUIT DID NOT REJECT THE RES JUDICATA COMPONENT OF THE RELITIGATION EXCEPTION OF THE ANTI-INJUNCTION ACT.

The issue before the fifth circuit was whether the district court could rely on the most expansive notion of res judicata to override the principles of federalism, comity and the constitutional independence of states, upon which congress based the Act, to support an injunction under the relitigation exception of the Act. The fifth circuit correctly acknowledged that this Court's decision in *Chick Kam Choo* limits injunctions under the relitigation exception to issues actually presented to, and decided by, the federal courts. The decision to reverse the district court's injunction of Deus' state court fraud claim did not violate the mandates of *Chick Kam Choo*. The fifth circuit

further acknowledged that those principles of res judicata which preclude litigation of claims a litigant could have brought, but did not, and which may be embodied in the relitigation exception, *Western Systems*, probably would have warranted an injunction if those were the circumstances of this case.

However, the fifth circuit found the principles of comity and federalism, the constitutional independence of the states and the strict and narrow limits imposed by congress on federal court injunctions of state court proceedings too compelling to ignore. On this basis, the lower court rejected an injunction grounded upon nothing more than the district court's discretionary refusal, without reason, of a viable claim Deus attempted to present by amending his complaint. While some authorities analyzing res judicata outside the context of the anti-injunction act have concluded that res judicata precludes subsequent litigation of claims rejected as untimely in earlier proceedings, (Restatement (Second) Judgments § 24(1)), the fifth circuit properly rejected this expansive view of res judicata as embodied in the relitigation exception of the act.

Virtually every decision of this Court addressing the limits of the exceptions to the Act have directed against any magnification of these exceptions. These exceptions "are narrow and are 'not [to] be enlarged by loose statutory construction.'" *Chick Kam Choo*, 486 U.S. at 146, *citing Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. 281, 287 (1970) and *Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511, 514 (1955). Consequently, the fifth circuit's decision to reject the broadest possible view of res judicata as embodied within

the relitigation exception and to reverse the trial court's injunction was proper under any of this court's interpretations of the Act and its exceptions. Allstate's contention the fifth circuit misapplied *Chick Kam Choo* is therefore without merit.

II. THE FIFTH CIRCUIT'S DECISION IN THE INSTANT CASE DOES NOT CONFLICT WITH ANY OTHER CIRCUIT COURT'S INTERPRETATION OF *CHICK KAM CHOO* AND THE SCOPE OF THE RELITIGATION EXCEPTION.

Equally deficient is Allstate's contention that the fifth circuit's decision conflicts with the decision of any other circuit which has addressed the scope of the relitigation exception. In *Western Systems*, the ninth circuit simply held a litigant's failure to raise a cause of action in federal court which he could have raised is grounds for a district court to rely on the res judicata component of the relitigation exception to enjoin litigation of that cause in state court. In the instant case, the fifth circuit noted that such "an injunction probably would have been warranted" had Deus not raised an additional cause when he attempted to amend his complaint. (Appendix of Original Petition at 33a.) Additionally, the fifth circuit's decision does not conflict with the decisions of the circuits which have strictly construed *Chick Kam Choo's* use of the phrase "actually have been decided". Because the district court denied Deus the opportunity to present the claim it necessarily did not render an actual decision on the merits of that claim. Hence, no conflicts among the circuits exist.

Allstate's attempt to inject confusion and conflict into the fifth circuit's application of the relitigation exception of the anti-injunction act through a distorted reading of that court's opinion is meritless. The fifth circuit has clearly remained within the confines of both congress' and this Court's mandates. Its decision to adhere to the principles of comity, federalism and the constitutional independence of the states in the face of a discretionary decision of a district court to reject an amendment to the pleadings stating a viable cause of action is beyond reproach. [1]

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[1] In spite of this Court's consistent and repeated emphasis on comity, federalism and the constitutional independence of the states, *Atlantic Coast Line* and *Chick Kam Choo*, Allstate has attempted to capitalize on alleged inadequacies in Louisiana law and "pitfalls" inherent the fifth circuit's interpretation of *Chick Kam Choo*. (Original Petition at 12-15.) This focus is misplaced and inconsistent with prior decisions of this Court. "The act absolutely prohibits in [actions which do not fall under an exception] all federal equitable intervention in a pending state court proceeding . . . regardless of how extraordinary the particular circumstances may be." *Mitchum v. Foster*, 407 U.S. 225, 229 (1972). Further, in construing and applying the Act, federal courts are not to be influenced by any assumption that the state courts will not protect federal rights. *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. 511 (1955).

III. ALLSTATE'S OPPOSITION TO DEUS' ATTEMPTED AMENDMENT EVIDENCES THE FACT OF THE DIFFERENCES BETWEEN THE FRAUD CLAIM AND THE CLAIMS THE DISTRICT COURT ACTUALLY DECIDED.

Further compromising Allstate's position before this Court is its opposition in the first instance to Deus' attempt to present his fraud claim to the district court. When Deus attempted to amend his complaint to include his claim for fraud Allstate objected on the grounds that Deus was adding "a new cause of action", (Appendix at 2a), "factually inconsistent" with his other claims. (Appendix at 6a.) Allstate further proclaimed prejudice on the basis that it was at that point near trial yet "at no time was [it] aware that it was facing an allegation of fraud, and therefore did not attempt to defend itself against an allegation of fraud."[2] (Appendix at 4a.) Now, before this Court Allstate attempts to present the state court fraud claim as so inextricably intertwined with the claims actually decided by the district court that an injunction should prevail. These inconsistent positions based plainly on Allstate's immediate interests are alone sufficient to deny Allstate's application.

Moreover, Allstate's opposition, which necessarily led to the district court's discretionary rejection of Deus'

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[2] In this regard, Allstate also accuses Deus of dilatory tactics. (Appendix at 1a-2a.) However, neither the fifth circuit nor the district court found that Deus was dilatory.

amending complaint, is the source of the dilemma it now faces and precludes any injunction because it prevented any opportunity for the district court to address the merits of the claim, together with whatever evidence which might have been presented in conjunction therewith. As gleaned by *Chick Kam Choo* from *Atlantic*, the precise state of the record must be considered together with what the judgment sought to be protected actually said before a proper determination can be made on whether an injunction can issue. *Chick Kam Choo*, 486 U.S. at 148. No argument of counsel, evidence or reasons of the court are available to determine what protection the courts should afford the judgment. Accordingly, injunctin is improper.

IV. COLLATERAL ESTOPPEL DOES NOT BAR LITIGATION OF DEUS' FRAUD CLAIM IN STATE COURT.

Finally, Allstate's claim that collateral estoppel precludes Deus from litigating his fraud claim in state court is likewise baseless. Allstate contends the issues the district court actually decided collaterally estop a finding of fraud by the state court. The record is devoid of any indication the district court granted the injunction based upon such a conclusion. Moreover, by denying Deus' amending complaint the district court denied itself the ability to review factors relative to Deus' fraud claim. Therefore, the district court could not consider what it actually decided in light of Deus' fraud claim and therefore could not conclude the former necessarily dictated collateral estoppel of the latter. Thus, the conclusion the district court did reach was without foundation.

CONCLUSION

For the reasons stated in this opposition, this Court should deny Allstate's petition.

Respectfully submitted,

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APPENDIX A

[Filed Jan. 21, 1992]

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 88-2099

FRANK D. DEUS

-vs-

ALLSTATE INSURANCE COMPANY

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO FILE THIRD
SUPPLEMENTAL AND AMENDING PETITION
AND MOTION FOR SANCTIONS

MAY IT PLEASE THE COURT:

Allstate Insurance Company ("Allstate" or "defendant") opposes plaintiff's Motion for Leave to File Third Supplemental and Amending Petition [1] because plaintiff's proposed amendment is merely a tactical maneuver to attempt to sneak in an allegation of fraud, seven weeks prior to trial, when defendant has not been defending itself against any fraud allegations for the past three and one-half years. Additionally, the proposed allegations in plaintiff's third supplemental and amending petition cause undue prejudice to Allstate and could have been alleged months ago. Plaintiff seeks to add a new cause of action for fraud under La. C.C. Art. 1953, which is one of the conventional obligations articles dealing with "vices of consent." To prevail on a fraud claim under Article 1953, plaintiff must show by a preponderance of the evidence that defendant, Allstate, intended to defraud him at the confection of the contract and that plaintiff suffered actual pecuniary damages as a result. LSA-C.C. Art. 1953; *Pittman v. Piper*, 542 So. 2d 700, 702 (La. App. 4th Cir. 1989); *Home Indemnity Co., Inc. v. Boe*, 499 So. 2d 1301, 1302 (La. App. 4th Cir. 1986). See also *Haggerty v. March*, 480 So. 2d 1064, 1068 (La. App. 5th Cir. 1985).

This newly alleged cause of action would be subject to dismissal by summary judgment and/or under Federal Rule of Civil Procedure 12(b)(6) because even accepting all the allegations as true, there is no evidence or testimony that Allstate intended to defraud Deus at the

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[1] It is interesting that plaintiff has entitled this a supplemental and amending petition because it implies that he intends to supplement his original allegations with new causes of action.

time it formed the contract, or implemented its amendments and its policies regarding Peer Review analysis. The individuals alleged to have manipulated the peer groups are said to have done so in contravention of Allstate's established policies. Therefore there could be no fraud under the theory alleged in plaintiff's proposed amendment.

A claim pursuant to Article 1953 is nonsensical because Deus alleges defendant breached his contract, not that there was never a contract because fraud had vitiated plaintiff's consent. (See Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at p. 4); (Statement of Disputed Facts No. 12 and pps. 44, 47, 57, 59, 71 in which he argues this new cause of action for the first time.)

The amendment also seeks to add excess verbiage regarding plaintiff's allegation that defendant breached its contract and intentionally inflicted emotional distress which have already been alleged in earlier petitions. Furthermore, plaintiff admits in his memorandum in support that plaintiff "had previously alleged facts in his petition which would assert the commission of a fraud on plaintiff; however, in an abundance of caution, plaintiff would like to amend its petition." (See Plaintiff's Memorandum in Support of Motion for Leave to File Supplemental and Amending Petition at p. 3, a copy of which is attached hereto as Exhibit "A").

Rule 15(a) of the Federal Rules of Civil Procedure does not require this Court to allow the plaintiff to amend to add a new cause of action which is prejudicial when the

supporting factual allegations have already been raised in earlier petitions.

The Fifth Circuit has succinctly outlined the scope of the court's discretion when faced with a Motion for Leave to File and *[sic]* Amended Complaint:

> In exercising its discretion, the district court should consider several factors. Among these factors, the court may consider whether the amendment would cause undue delay in the proceedings, undue prejudice to the non-movant, and whether the movant is acting in bad faith.

Ross v. Houston Independent Schools District, 699 F.2d 218, 228 (5th Cir. 1983). Additionally, the district court should only allow an amendment which could not have been raised initially. See *Barrett v. Independent Order of Foresters*, 625 F.2d 73, 75 (5th Cir. 1980). In *Barrett*, the proposed amendment sought to add several new parties and additional counts. Even though the motion was not filed until nearly 10 months after the original complaint, there appeared to be no matters that appellant proposed to add which could not have been raised initially. Given those circumstances, the Fifth Circuit could not find that the trial judge abused his discretion in denying plaintiff's motion for leave to amend. *Id.* at 75.

Furthermore, in *Daly v. Sprague*, 675 F.2d 716 (5th Cir. 1982), the Fifth Circuit found that a district court did not abuse its discretion in denying an amended complaint which asserted new allegations that were not germane to the original action and which were filed 16 months after

the filing of the original complaint. *Id.* at 723. Here, Deus filed his original complaint in August, 1988, and his first and second supplemental and amending petitions on December 16, 1988 and May 25, 1989. Thus, this proposed third amendment comes more than three and one-half years since the original complaint was filed.

Defendant, Allstate, would be unduly prejudiced if plaintiff is granted leave to file a third supplemental and amending petition because more than nine depositions have been taken by plaintiff in this matter and at no time was defendant aware that it was facing an allegation of fraud, and therefore did not attempt to defend itself against an allegation of fraud.[2] Contrary to plaintiff's statement that the filing of this third supplemental and amending petition would not unduly delay this matter, defendant submits that it would be necessary to re-depose at least nine individuals in order to defend itself against this new allegation of fraud. This would certainly delay trial of this matter once more and be quite costly for both parties. Federal Rule of Civil Procedure 15(a) does not require this Court to allow an amendment seven weeks prior to the March 9, 1992 trial date of this matter. Plaintiff is attempting to harass defendant and cause unnecessary delay and to needlessly increase the costs of this litigation. The Fifth Circuit has upheld a refusal to allow amendment where the motion for leave to amend was filed 10 weeks before trial. *Harvey v. Andrist*, 754

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[2]In fact, defendant's first knowledge that plaintiff was alleging fraud was on January 10, 1992, when counsel received plaintiff's memorandum in opposition to Allstate's Motion for Summary Judgment.

F.2d 569, 571 n.1 (5th Cir. 1985), *cert denied* 471 U.S. 1126, 105 S.Ct. 2659, 86 L.Ed.2d 276 (1985). In this case, the trial date is March 9, 1992, which is less than 7 weeks away. Trial has already been postponed three times for various reasons.

Plaintiff argues that his whole basis for amending at this late date is as a result of the deposition of James Ivy, a former employee of Allstate whose employment was involuntarily terminated. [3] However, no new facts were discovered by Ivy's deposition which would support an allegation of fraud. Incidentally, Ivy was deposed on November 25, 1991 and yet plaintiff chose to wait until January 9, 1992 to file his motion for leave to amend.

Plaintiff's proposed Third Supplemental and Amending Petition is interposed to harass and cause unnecessary delay and to needlessly increase the costs of this litigation. Moreover, a cause of action under La. C.C. Art. 1953 would be subject to dismissal and is factually inconsistent with Deus' other contract complaints. Defendant therefore respectfully requests that this Court impose sanctions in accordance with Rule 11 of the Federal Rules of Civil Procedure against plaintiff and plaintiff's counsel as it deems fit, including a reasonable attorney's fee.

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[3]As plaintiff has brought to this Court's attention, Ivy is currently the plaintiff in a civil rights suit against Allstate which brightly illustrates his bias against Allstate in this matter. Therefore, Ivy's testimony should be afforded no weight.

For these reasons, Allstate respectfully requests that this Court deny plaintiff's Motion for Leave to File a Third Supplemental and Amending Petition and issue an order imposing sanctions against plaintiff and his counsel.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 2 1994
OFFICE OF THE CLERK

No. 94-32

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ALLSTATE INSURANCE COMPANY,
Respondent,

v.

FRANK S. DEUS and

VOORHIES & LABBÉ,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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cert denied ___ U.S. ___,
113 S.Ct. 970 (1993)

Statutes and Rules

28 U.S.C. Sec. 1332

28 U.S.C. Sec. 2283

STATEMENT OF THE CASE

Frank Deus filed suit against Allstate Insurance Company in the United States District Court, Western District of Louisiana, alleging intentional infliction of emotional distress and breach of contract. A similar suit was filed in the Fifteenth Judicial District Court, Parish of Lafayette, Louisiana. The litigation proceeded in federal court and, in October, 1990, Deus served interrogatories on Allstate, requesting the names and addresses of various witnesses to the case, including certain agents and managers employed by Allstate.

A key witness at this time was James Ivy, an employee of Allstate. However, Allstate refused to provide any information concerning the whereabouts of James Ivy, and numerous discovery disputes ensued. Eventually, in January, 1991 the Magistrate for the Western District Court ordered Allstate to produce the requested information. However, discovery disputes continued, and it was not until approximately November of 1991 that Allstate finally provided information to Plaintiff concerning the current location of James Ivy.

Shortly thereafter, i.e. on November 25, 1991, James Ivy's deposition was taken in Mississippi. At this time, it became clear from Ivy's testimony that Allstate had committed a fraud on Plaintiff, in addition to intentionally inflicting emotional distress on Plaintiff, and breaching his contract. (Before James Ivy's deposition, Plaintiff had no specific evidence to show that Allstate had actually defrauded him as that cause of action is defined under Louisiana law.) On January 9, 1992, a little over one month after Ivy's deposition was taken, Plaintiff amended his petition to assert a cause of action for fraud, and to allege the specific facts upon which the claims of fraud were based.

On January 21, 1992, Allstate objected to the filing of Plaintiff's amending petition. Allstate argued that, when it conducted discovery during the course of the litigation, it had not been defending itself against the entirely new and separate allegations of fraud and, if Plaintiff was allowed to amend his petition, it would have to retake various depositions. On February 11, 1992, the district court signed an order disallowing the assertion of Plaintiff's fraud claims, without assigning any reasons for doing so.

Only after the district court denied Plaintiff the opportunity to assert his fraud claims did Plaintiff amend his state court petition to assert the fraud. Two additional defendants were also named in the amended state court petition; from Ivy's testimony, it was clear that these two individuals, in addition to Allstate, were intimately involved in the fraud.

After a trial on the merits that did not include any allegations or evidence concerning Allstate's fraud on Plaintiff, a jury found in favor of Plaintiff on the intentional infliction of emotional distress claim. Several months later, after first denying Allstate's 5)(a) motion for judgment as a matter of law, the district court reversed itself without warning, and granted Allstate's motion, dismissing Plaintiff's case. It later enjoined Plaintiff fro proceeding in state court, even as to the fraud claims which had not been litigated in federal court. Plaintiff appealed the entire decision of the district court, including the district court's decision to deny the filing of the amended petition. The Fifth Circuit reversed that portion of the district court's decision enjoining Plaintiff from proceeding in state court on the fraud claims, and held that, since the district court had refused to allow Plaintiff to assert his fraud claims in the federal forum, the fraud claims could not possibly be included in

the "relitigation exception" to the Anti-Injunction Act. Allstate then filed this petition for writ of certiorari to this Court.

ARGUMENT

1. The relitigation exception to the Anti-Injunction Act does not include a situation where Plaintiff is specifically denied the opportunity to present his claims in federal court; the Fifth Circuit's decision on this issue does not illustrate any conflict among the Circuits concerning the Anti-Injunction Act, and specifically follows both the language and intent of Chick Kam Choo v. Exxon Corp., 108 S.Ct. 1684.

Allstate argues that the Fifth Circuit's decision in the instant case highlights a conflict among the Circuits concerning the relitigation exception to the Anti-Injunction Act, and further argues that the Fifth Circuit's decision makes the concept of res judicata inapplicable or unduly restrictive with regard to the Anti-Injunction Act. These contentions are incorrect.

FACTUAL BASIS OF ALLSTATE'S CONTENTIONS

First, the factual basis upon which Allstate's arguments are founded must be examined. Allstate claims that Deus' fraud claims were inadequately presented because they were "untimely" filed several months before the scheduled trial date. However, neither the district court nor the Fifth Circuit Court of Appeals held that the fraud claims were untimely. The district court gave no reasons for denying Deus the right to file the claims of fraud (see order of the district court, included in Allstate's appendix to its petition for writ of certiorari), and the Fifth Circuit Court of Appeals did not at any time hold that the amended petition was untimely filed.

In fact, a review of the record shows that Deus' claims of fraud were not untimely. When the lawsuit was first filed, the available evidence indicated that the torts of intentional infliction of emotional distress and abuse of rights had occurred. It was not until a key witness, James Ivy, was deposed that the specific evidence showing fraud was uncovered. (Under Louisiana law Plaintiff cannot allege or show fraud without asserting the specific facts upon which the fraud is allegedly based.)

James Ivy was not deposed until November, 1991, approximately four and one half months before the scheduled trial date of this case, because Allstate failed and refused to provide the information necessary to locate him. Ivy was an employee of Allstate, and Plaintiff propounded interrogatories to Allstate to obtain his address. (See Plaintiff's Appendix A, Memorandum in Support of Motion to File Supplemental and Amending Petition. The interrogatories requesting the necessary information were propounded to Allstate on October 23, 1990.) Allstate refused to provide this and other information, and numerous discovery disputes ensued. After numerous conferences with the Magistrate, Allstate was ordered to produce the information, and, in approximately November of 1991, Allstate finally provided the address of James Ivy. Ivy was then deposed in his home town in Mississippi, at which time it became clear that, in addition to the other torts already asserted, Allstate had committed a fraud on Deus. The supplemental and amending petition alleging fraud was filed shortly thereafter. Thus, Deus' amending petition alleging fraud was not untimely, but was instead filed as soon as Plaintiff obtained the evidence indicating that a fraud had occurred. The fact that Ivy was not deposed until several months before trial was a direct result of Allstate's concealment and calculated delay tactics, as well as its

failure to properly and fairly respond to valid discovery requests.

RELEVANT LAW

Allstate argues that the Fifth Circuit's decision in the instant case improperly narrows the relitigation exception to the Anti-Injunction Act. To make this argument, Allstate asserts that the Fifth Circuit's decision limits the relitigation exception of the Anti-Injunction Act to only those claims "that have actually been decided" by a federal court, thus precluding the application of the broader concept of res judicata to the relitigation exception. However, a review of the actual language of the Fifth Circuit decision indicates that this is simply not correct. The Fifth Circuit specifically stated that res judicata would ordinarily apply to bar the assertion of the fraud claims in state court, but:

> Because the district court denied Deus' petition to amend his complaint, he did not have an opportunity to litigate his fraud claims. As a result, he cannot be enjoined from arguing them to the state court. Had Deus not attempted to amend his complaint, an injunction probably would have been warranted under principles of res judicata and collateral estoppel embodied in Section 2283. See Chick Kam Choo 486 U.S. at 147, 108 S.Ct. at 1690. Under Jackson, "claim" is defined broadly to include "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transactions, or series of connected transactions, out of which the action arose." Jackson, 862 F. 2d at 501

(adopting definition of RESTATEMENT (SECOND) OF JUDGMENTS SECTION 24). Thus any claims that he did not try to assert could have been enjoined. 15 F. 3d at 524, Deus v. Allstate.

Although a conflict may ultimately exist among the Circuits concerning the relitigation exception to the Anti-Injunction Act, this case does not fall within that conflict, and is not the proper case to review and resolve that conflict. In conjunction with the Ninth Circuit, the Fifth Circuit has indicated that, under the appropriate circumstances, both collateral estoppel and res judicata are included within the relitigation exception to the Anti-Injunction Statute. However, as the Fifth Circuit recognized in the instant decision, even if Chick Kam Choo, supra, allows or requires the application of res judicata to the relitigation exception, res judicata cannot apply to the instant case, since Deus made a good faith effort to assert his fraud claims in federal court, but was not allowed to do so. The fraud claims were not claims which were asserted, or could have been asserted, in the instant litigation. (It was Allstate itself that objected to Plaintiff's assertion of his fraud claims in the federal forum, and refused to consent to the assertion of all of Plaintiff's claims in the federal court litigation.)

The Fifth Circuit's decision in the instant case merely tracks the language in **Chick Kam Choo**, supra, and follows the intent of the Anti-Injunction Act. As this Court stated in Chick Kam Choo, the relitigation exception to the Anti-Injunction Act protects only what a federal judgment actually says, not what it was intended to say.

Allstate also attempts to use Western Systems, Inc. v. Ulloa, 958 F. 2d 864 (9th Circuit 1992) to argue that res judicata requires this Court to bar Deus from litigating his fraud claims in state court. However, as Western Systems, supra, itself points out, res judicata only applies to claims which were asserted or **could** have been asserted in federal court. In the instant case, although Deus attempted to assert his fraud claims in federal court, the district court specifically denied Deus this opportunity, and refused to allow these claims to be filed. Thus, Deus' fraud claims **could not** be asserted in federal court, and res judicata has no effect on these claims.

(Likewise, as Western Systems, supra, points out, res judicata has no effect on claims which are not asserted due to the misrepresentation or concealment of the opposing party. As outlined above, and as evidenced by the court record, Plaintiff did not find out about the fraud claims until late in the litigation because of Allstate's specific refusal to provide the requested information. Also, as the Ninth Circuit in Western Systems, supra, stated, "[U]nder the compelling circumstances of [that] case", where the litigation had been ongoing for seventeen years, and Plaintiffs clearly had knowledge and notice of all claims asserted in the subsequent state court litigation, an injunction was proper under Chick Kam Choo. This was certainly not the case in the instant litigation.)

Two final points should be noted here. Allstate asserts in its brief to this Court that Deus did not appeal the district court's denial of its motion to file the amending and supplemental petition alleging fraud. Again, this is not correct. Deus appealed the entire judgment of the district court, which necessarily included the order denying the motion to amend. Due to space limitations in Deus' brief to the Fifth Circuit, this

issue was not dealt with at great length; however, based on Deus' appeal of this issue, the Fifth Circuit addressed the issue in its opinion. And, Deus can hardly be accused of forum shopping when he first attempted to assert the fraud claims in federal court, but was disallowed from doing so. The state court petition setting forth the allegations of fraud was filed only after the federal district court, at Allstate's urging, refused to allow Deus to assert the allegations in federal court.

In conclusion, Deus' fraud claims were not "inadequately presented" or presented in an untimely fashion, and this case does not illustrate any conflict between the Ninth Circuit's interpretation of Chick Kam Choo, supra, and the interpretation of other Circuits.

2. Deus' fraud claims are entirely separate and distinct from the claims actually litigated in the federal court lawsuit; a decision on the merits of the claim of intentional infliction of emotional distress does not in any way preclude a separate, and perhaps different, decision on the merits of any fraud claims.

Allstate next argues that the federal court's decision on the issues of intentional infliction of emotional distress "necessarily dictates" the outcome of any state court litigation on fraud. This argument is directly contrary to the argument that Allstate made at the trial level, when it urged the district court to disallow the filing of the amended petition alleging fraud. At the trial level, Allstate argued to the district court that, because the elements of fraud were so different from the elements required to show intentional infliction of emotional distress, it would have to retake the numerous depositions it had already taken in the case in order to defend against these new allegations of fraud. (See copy of Allstate's Memorandum in Opposition to

Plaintiff's Motion For Leave to File Third Supplemental and Amending Petition and Motion For Sanctions, attached to the Intervenor's Response to Allstate's Petition for Writ of Certiorari as Appendix A.) In fact, the elements and facts needed to prove fraud under Louisiana law are entirely different than those required to prove intentional infliction of emotional distress.

Additionally, in granting Allstate's 50(a) motion, the district court only held that, in its opinion, the evidence was insufficient to show that Allstate actually intended to inflict emotional distress on Deus. The district court's decision did not in any way address whether Allstate had committed a fraud upon Plaintiff; whether Allstate committed a fraud upon Plaintiff has not yet been litigated. (Under Louisiana law, an entity can perpetrate a fraud on an individual without also intending to inflict emotional distress upon him, and claims of fraud require entirely separate facts and elements of proof from those required when the tort of intentional infliction of emotional distress is alleged.) Therefore, the federal court's decision on the merits of the claim for intentional infliction of emotional distress cannot support an injunction against the state court suit for fraud, under the clear mandate of the Anti-Injunction Act and the language of Chick Kam Choo, supra.

CONCLUSION

The Fifth Circuit followed the language and meaning of Chick Kam Choo, supra, and the Anti-Injunction Act when it enjoined Deus from relitigating only those claims which were asserted in federal court, and/or which he was allowed to assert in federal court. The Fifth Circuit's decision does not highlight any specific conflict between Ninth and other Circuits concerning the relitigation exception, and, factually, this case does not illustrate a situation in which Deus' unlitigated claims were "inadequately presented." For these reasons, Plaintiff submits to the Court that a writ of certiorari in this case on this narrow issue is unwarranted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FRANK S. DEUS : DOCKET NUMBER: 88-2099
VERSUS : JUDGE SCOTT
ALLSTATE INS. CO. : MAGISTATE METHVIN

* *

MOTION FOR LEAVE TO FILE
THIRD SUPPLEMENTAL AND AMENDING PETITION

NOW INTO COURT, through undersigned counsel, comes plaintiff, FRANK DEUS, and considering the merits of the foregoing memorandum in support hereof, plaintiff moves the court for an order allowing him to file the attached Third Supplemental and Amending Petition. Plaintiff would note herein that defendant objects to the filing of this petition. However, as set forth in the memorandum which accompanies this motion, plaintiff would show that the filing of this Third Supplemental and Amending Petition would not unduly delay this matter.

Respectfully submitted:

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BY: **/s/H. LEE LEONARD**
KEITHA A. LEONARD
ATTORNEYS FOR FRANK S. DEUS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FRANK S. DEUS : DOCKET NUMBER: 88-2099
VERSUS : JUDGE SCOTT
ALLSTATE INS. CO. : MAGISTATE METHVIN
* *

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL AND AMENDING PETITION

MAY IT PLEASE THE COURT:

Plaintiff is seeking an order from this Court, allowing it to amend and/or supplement its original petition with information and facts only recently obtained through the deposition of James Ivy. The relevant facts leading to Mr. Ivy's valuable testimony are as follows:

On October 23, 1990, plaintiff requested a list of agents and managers in the Louisiana area, as well as their last known addresses, knowing that this information would be important to developing plaintiff's case, since many of these agents/managers could be witnesses. Allstate systematically refused to produce any such list, or provide any information whatsoever concerning the names and/or last known addresses of agents or managers in the Louisiana territory, including the Lafayette District. Although Allstate was finally ordered to produce such a list in January of 1991, or produce documents to show this information, Allstate still has not produced such a list, and claims that it has no idea who its employees were for the years 1985 through 1990, and has no information on their current or last known addresses.

After much prodding, Allstate finally orally provided the last known address of the former manager, James Ivy. The last known address happened to be in Oxford, Mississippi, and once Allstate finally provided this information, plaintiff was able to track Mr. Ivy down, and schedule his deposition. The information concerning Ivy's whereabouts was provided to plaintiff by Allstate in approximately November of 1991. It should be pointed out that it is most likely that Allstate at all times knew the whereabouts of Ivy, since Ivy had an EEOC claim against Allstate, and that EEOC claim is still pending. At the very minimum, Allstate could have provided the same of Ivy's attorney, through which plaintiff's counsel could have obtained Ivy's last known address much earlier in this litigation.

In any event, once Ivy was finally tracked down and the deposition of James Ivy was taken in Oxford, Mississippi in late November 1991, plaintiff was able to develop additional facts which fully support all aspects of this claim, and further, which indicate that Allstate has defrauded plaintiff. Specifically, James Ivy testified that Allstate manipulated, "finagled", and "played with" Frank Deus' peer groups, to falsely make it appear as though Frank Deus was on the bottom of these peer groups. Deus was then placed on corrective review, in violation of his contract, based upon the misrepresented and falsified data.

The testimony of Ivy definitely confirms that Allstate perpetrated a fraud on plaintiff, an intentional tort and/or a violation of plaintiff's contract with Allstate. Plaintiff had previously alleged facts in his petition which would assert the commission of a fraud on plaintiff; however, in an abundance of caution, plaintiff would like to amend its petition, to assert the facts recently provided by Ivy's testimony, which definitely show that fraud was committed. Plaintiff has previously alleged maliciousness, and other acts by Allstate which would constitute a fraud (see a copy of the original petition, attached hereto as

Exhibit "A"). However, since these new facts have been recently developed, which further shows fraud, plaintiff believes it would be in the interest of justice, for the court to allow plaintiff to assert these newly acquired facts relevant to fraud in its supplemental and amending petition.

Respectfully submitted:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FRANK S. DEUS : DOCKET NUMBER: 88-2099
VERSUS : JUDGE SCOTT
ALLSTATE INS. CO. : MAGISTATE METHVIN
* *

PLAINTIFF'S THIRD SUPPLEMENTAL AND AMENDING PETITION

NOW INTO COURT, through undersigned counsel, comes plaintiff, FRANK DEUS, who desires to amend and/or supplement his original complaint, by adding the following paragraphs, to-wit:

1.

By adding as paragraph 13 to the original petition, the following:

13.

Allstate Insurance Company, through its managers, including Raley, Rhodes, Artigues, and Blankenhorn, specifically, deliberately, maliciously and intentionally manipulated, fabricated, and falsified plaintiff's "peer groups", to make it appear as though plaintiff's work was unsatisfactory when, in fact, it was not. Additionally, Allstate, through its managers, Raley, Rhodes, Artigues, and Blankenhorn, used these false and fabricated "peer groups" to fraudulently and/or in bad

faith place plaintiff on "corrective review" and on "job-in-jeopardy".

2.

By adding as paragraph 14 to the original petition, the following:

14.

Specifically, in 1985, Allstate placed Frank Deus on corrective review contrary to its policies and procedures, when Frank Deus was not actually deserving of this treatment. Thereafter, in 1986, Allstate again manipulated, changed and falsified its peer groups, and threatened Frank Deus with corrective review, when he was not actually last in his true peer group.

Finally, in 1987, Allstate deliberately, intentionally, and maliciously falsified and misrepresented data to falsely make it appear that Frank Deus was last in his peer group, to permit his placement on corrective review, in violation of his contract. Subsequent thereto, Allstate maliciously and intentionally and/or recklessly placed Frank Deus on job in jeopardy, based upon falsified and fabricated data and/or results, and placed Frank Deus on job in jeopardy, contrary to Frank Deus' contract and/or Allstate's policies and procedures, rules and regulations.

3.

By adding as paragraph 15 to the original petition, the following:

15.

Additionally, in an effort to intentionally, deliberately, maliciously, recklessly, and severely emotionally harass and distress Frank Deus, Allstate Insurance Company, through its managers, took numerous actions, such as cutting back on previously promised, and contractually obligated secretarial help;

forcing Frank Deus to act as a "secretary" for the managers in his office; surrounding Frank Deus' company office with NOA offices to "squeeze" Frank Deus out of the company office, and severely restrict Frank Deus' ability to produce business; made numerous threats to plaintiff about his job; and took numerous other actions, which will be shown at the trial of this matter. These actions amounted to a bad faith breach of Frank Deus' employment contract with Allstate, as well as a fraud on Frank Deus and intentional infliction of emotional distress, through either deliberate, intentional actions, or actions so reckless, wanton and wilful that they rise to the level of intentional tort.

WHEREFORE, plaintiff prays that it be permitted to file and serve this Third Supplemental and Amending Petition, that, after proceedings had, this Third Supplemental and Amending Petition be deemed good and sufficient, and that, there be judgment on this petition and on all previous petitions, in his favor, against Allstate, taxing Allstate with all costs of these proceedings, and for all other legal, general, and equitable relief.

Respectfully submitted:

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KEITHA A. LEONARD
ATTORNEYS FOR FRANK S. DEUS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FRANK S. DEUS : DOCKET NUMBER: 88-2099
VERSUS : JUDGE SCOTT
ALLSTATE INS. CO. : MAGISTATE METHVIN
* *

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY that I, counsel for plaintiff, FRANK S. DEUS, have notified opposing counsel of our intent to file a Third Supplemental and Amending petition and opposing counsel has refused to consent to the filing and granting of such motion.

Lafayette, Louisiana, this ___ day of January, 1992.

_____
KEITHA A. LEONARD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FRANK S. DEUS : DOCKET NUMBER: 88-2099
VERSUS : JUDGE SCOTT
ALLSTATE INS. CO. : MAGISTATE METHVIN
* *

O R D E R

On motion of plaintiff, FRANK DEUS, through his attorneys of record, H. LEE LEONARD and KEITHA A. LEONARD:

IT IS ORDERED that leave be hereby granted to Frank Deus to file his Third Supplemental and Amending Petition.

LAFAYETTE, LOUISIANA, this ___ day of _____, 1992.

_____
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FRANK S. DEUS : DOCKET NUMBER: 88-2099
VERSUS : JUDGE SCOTT
ALLSTATE INS. CO. : MAGISTATE METHVIN
* *

SUPPLEMENTAL MOTION TO PROPOUND
MORE THAN TWENTY-FIVE INTERROGATORIES

NOW INTO COURT, through undersigned counsel, comes plaintiff, FRANK S. DEUS, who moves this Court for an Order allowing plaintiff to propound to defendant, ALLSTATE INSURANCE COMPANY, more than twenty-five (25) Interrogatories. Due to the complexity of this case, and the nature of this litigation, more than twenty-five (25) Interrogatories must be propounded in order to properly prepare plaintiff's case, as set forth in detail in the supplemental memorandum which accompanies this motion.

Respectfully submitted:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FRANK S. DEUS : DOCKET NUMBER: 88-2099
VERSUS : JUDGE SCOTT
ALLSTATE INS. CO. : MAGISTATE METHVIN
* *

ORDER

Considering the foregoing motion;

IT IS ORDERED that plaintiff, FRANK S. DEUS, be allowed to propound to defendant, ALLSTATE INSURANCE COMPANY, more than twenty-five (25) Interrogatories.

Lafayette, Louisiana, this _____ day of _____, 1991.

_____
MAGISTRATE MILDRED METHVIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FRANK S. DEUS : DOCKET NUMBER: 88-2099
VERSUS : JUDGE SCOTT
ALLSTATE INS. CO. : MAGISTATE METHVIN
* *

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
MOTION TO ALLOW PLAINTIFF TO
PROPOUND MORE THAN TWENTY-FIVE
INTERROGATORIES

MAY IT PLEASE THE COURT:

Plaintiff requests that he be allowed to propound the attached Interrogatory, marked as EXHIBIT A, in addition to the two other Interrogatories which it has previously submitted to this Honorable Court. Quite some time ago, plaintiff, in a "Consolidated Outstanding Discovery Request" requested that defendant provide a "list of names and last known addresses on all managers and agents employed by Allstate in Louisiana from the years 1968 through December of 1990". Thereafter, by agreement, plaintiff limited this request to the years 1980 through 1990.

At the time that this Consolidated Outstanding Discovery Request was compiled, it was plaintiff's understanding that defendant would compile the list, even if it did not have such a list in its possession. However, defendant has recently responded, saying that it simply does not have a list and does not want to prepare one. This information is very important to plaintiff's discovery of its case, and defendant has delayed for

over a year now in terms of producing this information. Therefore, plaintiff requests that it be allowed to file this Interrogatory, in the event that there is any misunderstanding that defendant is required to produce such a list to plaintiff.

Respectfully submitted:

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ATTORNEYS FOR FRANK S. DEUS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FRANK S. DEUS	:	**DOCKET NUMBER: 88-2099**
VERSUS	:	**JUDGE SCOTT**
ALLSTATE INS. CO.	:	**MAGISTATE METHVIN**

* *

PLAINTIFF'S FOURTH SET OF
INTERROGATORIES TO DEFENDANT

NOW COMES Plaintiff herein, FRANK S. DEUS, and hereby requests that Defendant answer the following Interrogatories separately and fully in writing and under oath within thirty (30) days from the date of service hereof, pursuant to Rule 33 of the Federal Rules of Civil Procedure.

In answering these Interrogatories, furnish all information available to you, including information in the possession of your attorneys, or their investigators, and all persons acting on your behalf and not merely such information known of your own personal knowledge. If you cannot answer the Interrogatories in full after exercising due diligence to secure the information, so state and answer to the extent possible, specifying you inability to answer the remainder and stating whatever information or knowledge you have concerning the unanswered portions.

The Interrogatories which follow are to be considered as continuing, and you are requested to provide, by way of supplemental answers thereto, such additional information as you or any other person acting on your behalf may hereafter obtain which will augment or other modify your answers now given to the Interrogatories below. Such supplementary responses are to be filed and served upon Plaintiff within thirty (30) days after the receipt of such information.

As used herein, the work "person" means natural persons, corporations, partnerships, sole proprietorships, unions, associations, federations, or any kind of entity.

In each question wherein you are asked to "identify" a person, state with respect to such person: (a) his name; (b) his business address and telephone number; (c) the name and address of his employer; and, (d) his relationship to you.

In accordance with Local Rule 10.1 of the Western District of Louisiana, please type your response immediately following each Interrogatory. If the space allotted is insufficient, please retype the pages, repeating each question in full, followed by the answer or objection thereto. Please return these original Interrogatories and your responses to undersigned counsel, after completing the Affidavit attached hereto.

Respectfully submitted:

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BY: /s/**KEITHA A. LEONARD**
ATTORNEYS FOR FRANK S. DEUS

INTERROGATORY NO. 1:

Please list the names and last known addresses of all managers and agents employed by Allstate in Louisiana for the years 1980 through 1990, and state whether said agents and/or managers are currently employed by Allstate.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FRANK S. DEUS : DOCKET NUMBER: 88-2099
VERSUS : JUDGE SCOTT
ALLSTATE INS. CO. : MAGISTATE METHVIN
* *

STATE OF LOUISIANA *
* AFFIDAVIT
PARISH OF _____ *
****

BEFORE ME, the undersigned authority, a Notary Public in and for the aforesaid Parish and State, personally came and appeared _____, a representative of Allstate Insurance Company in the above entitled and numbered cause who, after being duly sworn, did depose and state that:

He/she has read the foregoing Answers to Plaintiff's Fourth Set of Interrogatories to Defendant, and he/she swears that they are true and correct.

_____

SWORN TO AND SUBSCRIBED before me, this _____ day of _____, 19___, at _____, Louisiana.

_____
NOTARY PUBLIC

FILED
NOV 21 1994
OFFICE OF THE CLERK

No. 94-32

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ALLSTATE INSURANCE COMPANY,
Petitioner,
v.
FRANK S. DEUS and
VOORHIES & LABBÉ,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

10 pp

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FRANK S. DEUS and
VOORHIES & LABBÉ,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONER

I. DEUS' CONTENTION THAT THE DISTRICT COURT IMPROPERLY REFUSED TO ENTERTAIN HIS FRAUD CLAIM IS IRRELEVANT TO THE QUESTION PRESENTED WHICH CONCERNS ONLY THE COURT'S POWER TO ENJOIN RELITIGATION OF THAT CLAIM IN STATE COURT

Deus' focus on the district court's refusal to entertain his fraud claim is a red herring. Whether the court properly denied his motion to add the fraud claim is entirely irrelevant to the question presented which involves the extent to which *res judicata*, as a component of the relitigation exception, survived this court's decision in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988). Deus

concedes that "a conflict may exist among the circuits" on that question (Deus' Response, p. 10).

In Deus' attempt to remove this case from that conflict, he never addresses whether the "could have been asserted" language encompasses inadequately presented claims. Rather, Deus simply offers his conclusion that because the District court improperly denied his motion to add his fraud claim, the claim is not one which "could have been asserted" for purposes of the relitigation exception. (*See* Deus' Response, p. 10). Deus makes this contention in an attempt to square the lower court with the Ninth Circuit's decision in *Western Systems, Inc. v. Ulloa,* 958 F.2d 864 (9th Cir. 1992), which interpreted the relitigation exception to encompass all claims that "might have been offered" in the prior proceeding. *Id.* at 871. The *Ulloa* court, however, concluded that the test for determining whether a claim could have been asserted in a prior proceeding turns on whether that claim arose "from the same 'transaction, or series of transactions' as the original action." *Id.* at 871, citing Restatement (Second) Judgments § 24(1). In this case, Deus does not dispute that all of his claims, including his fraud claim, arose from the same core of operative facts such that traditional application of *res judicata* would bar him from refiling the fraud claim in a subsequent federal action. *See Poe v. John Deere Co.,* 295 F.2d 1103 (8th Cir. 1982) (applying federal principles of *res judicata* to an analogous factual scenario independent of the Anti-Injunction Act). Under *Ulloa's* interpretation of the relitigation exception, therefore, Deus' fraud claim fits comfortably within the district court's injunctive power.

The district court's justification for refusing to entertain Deus' fraud claim sheds no light on the proper range of federal power to enjoin further litigation of that claim. The propriety of the district court's decision to

deny the motion to add the fraud claim is an issue for an appeal on the merits of that decision.[1]

Whether intended or not, the import of the Fifth Circuit's decision, and the theory urged by Deus, is that every claim rejected by a federal court for any reason "could not have been asserted" in that case, thus opening the door to reassertion of that claim in state court (*see* Deus' Response, p. 11). That theory collapses *res judicata* into collateral estoppel and, as argued in Allstate's petition, "deprives the federal district courts of the power and flexibility needed to prevent manipulation of our dual system of federal and state courts. . . ." (Petition For A Writ of *Certiorari,* p. 13). Despite Deus' protestations to the contrary, the court of appeals' narrow interpretation of federal injunctive power under the relitigation exception presents a question of national importance which has divided the courts of appeals, thus warranting issuance of a writ of certiorari to review the decision of the Fifth Circuit.

II. THE INJUNCTION WAS APPROPRIATE UNDER THE RELITIGATION EXCEPTION BECAUSE THE OUTCOME OF DEUS' FRAUD CLAIMS WAS NECESSARILY DICTATED BY THE LOWER COURTS FINDINGS OF FACT

Deus' response also highlights the need to clarify the application of the collateral estoppel component of the relitigation exception. In *Chick Kam Choo,* the Court approved the use of an injunction against relitigation of

---

[1] Indeed, Deus' suggestion that he appealed the entire case but that "space limitations" prevented him from dealing with the district court's denial of his motion to add his fraud claim at "great length" in his brief to the Fifth Circuit is disingenuous at best and misrepresents a clear record. (*See* Deus' Response pp. 11-12). Deus never mentioned the denial of his motion to amend in his statement of issues to the Fifth Circuit in either of his two appeals (*see* appendix A & B), and, similarly, the issue was never discussed in his briefs.

matters, the outcome of which are necessarily dictated by the district court's resolution of certain issues. 486 U.S. at 150. To avoid the reach of *Chick Kam Choo,* Deus now contends that the "decision on the merits of the claim of intentional infliction of emotional distress does not in anyway preclude a separate, and perhaps different, decision on the merits of any fraud claims." (Deus' Response, p. 12)

Deus' contention distorts a clear record. The analysis required by *Chick Kam Choo,* which was never undertaken by the court of appeals, establishes that the lower courts' resolution of Deus' claims on the merits necessarily dictates the outcome of his fraud claim. In support of his fraud claim, Deus alleged that Allstate "intentionally manipulated, fabricated, and falsified plaintiff's 'peer groups' to make it appear as though plaintiff's work was unsatisfactory when, in fact, it was not." (Petition For A *Writ of Certiorari,* 72a-74; 76a-80a). In granting Allstate's motion for judgment as a matter of law on Deus' intentional infliction of emotional distress claim, the district court expressly rejected those contentions, finding that "[w]e cannot imagine a more appropriate group for the purpose of corrective review." (Petition For A *Writ of Certiorari,* 63a-64a). Similarly, the court of appeals concluded "[t]o the extent that Allstate manipulated peer groups, it was in order to demonstrate the superior production of [neighborhood office agents] over [company office agents], not to harass Deus for any personal reasons." (Petition For A *Writ of Certiorari,* 13a).

The lower courts' conclusions that Deus' peer groups were not intentionally manipulated to create a false impression of poor work performance necessarily preclude a finding that those groups were fraudulently manipulated for the same purpose. Accordingly, the lower courts' rejection of the factual predicate for Deus' fraud claim supports the district court's injunction against relitigation of that claim in state court. The Fifth Circuit's over-

turning of the injunction allows collateral attack on the lower courts' conclusions. Indeed, permitting Deus to go forward on the fraud claim ultimately pits the state court against both the District Court and the Fifth Circuit, a result the relitigation exception was designed to prevent.

CONCLUSNON

The *Petition For A Writ Of Certiorari* should be granted.

Respectfully submitted,

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* Counsel of Record

Attorneys for Petitioner

APPENDICES

APPENDIX A

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. After the jury returned its verdict in Plaintiff's favor, and after the trial judge denied Defendant's Rule 50(a) motion for a directed verdict, the trial court changed its mind and granted the 50(a) motion on the issue of intentional infliction of emotional distress, dismissing Plaintiff's suit at Plaintiff's cost. However, the jury verdict was supported by substantial evidence, and the question on appeal thus becomes: whether the trial judge can substitute his opinions on credibility for those of the jury, and direct a verdict in favor of Defendant where the jury verdict is supported by substantial evidence and is dependent upon credibility determinations.

2. Plaintiff had a written employment contract with Allstate and asserted several breach of contract claims, based first upon Allstate's failure to honor its contractual provisions with regard to disciplinary proceedings; second, upon Allstate's failure to provide contractually agree upon support and assistance to sell insurance; and, third, upon constructive termination. However, the lower court dismissed all breach of contract claims, holding that the contract was void as contrary to public policy, and further, that Louisiana does not recognize the doctrine of constructive termination. The issue on appeal is whether a written contract, drafted by the employer, whereby the employer voluntarily agrees to limit the method by which an employee can be terminated, is unenforceable as contrary to public policy, and whether the trial court erred in dismissing all of Plaintiff's breach of contract claims pursuant to a 50(a) motion.

3. Plaintiff also asserted an abuse of rights claim, which was dismissed by the trial court on a motion for summary judgment. The issue on appeal is whether Plaintiff presented genuine issues of material fact to show that Allstate abused any right which it may have had to discipline him pursuant to its contractually mandated corrective review

procedure when it falsified that procedure, and whether the motion for summary judgment was improvidently granted.

4. Plaintiff also asserted a worker's compensation claim for his work-related injury caused by Allstate's intentional harassment and infliction of emotional distress. This claim was dismissed by the trial court on a motion for summary judgment. The issue on appeal is whether Louisiana law provides that a mental injury, caused by substantial stress on the job, fits the definition of "accident" within the meaning of the worker's compensation law in effect during 1987, and whether the motion for summary judgment was improvidently granted. Additionally, the issue on appeal is whether, under Louisiana law, an employer is liable for *both* worker's compensation and intentional tort, i.e. liable for both worker's compensation and intentional tort damages without any credit for amounts paid in worker's compensation against amounts due for the intentional tort.

5. As will be shown throughout this brief, Plaintiff presented substantial evidence to support his claims at trial. However, in the alternative, if this Court finds that sufficient evidence was not presented to support any claim, Plaintiff would note that, at trial, the court severely limited presentation of evidence which supported Plaintiff's case by allowing only three days for Plaintiff to present voluminous amounts of evidence in his case in chief, and refusing to allow Plaintiff's counsel to fully cross examine Allstate's witnesses (whom Plaintiff did not have time to call in his case in chief) when these witnesses were presented in Allstate's case in chief. Because of these arbitrary time restrictions, Plaintiff did not have time to present all of the witnesses, testimony, or evidence which supported his case. Therefore, the alternative issue on appeal is, if Plaintiff did not present sufficient evidence to support any of his claims, whether the trial judge erred in granting the Rule 50(a) motions for alleged lack of evidence to support the claims, when the lower court itself refused to allow Plaintiff to present all the evidence which supported his case.

APPENDIX B

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in granting the motion for summary judgment filed by the Intervenor, Voohries & Labbe, Plaintiff's previous attorneys, on the question of the Plaintiff's payment of additional litigation costs, when the only evidence in the record shows that Plaintiff was not liable for these costs, and the contract does not require him to pay such costs.

2. Whether a federal trial court has jurisdiction to enjoin state court proceedings once an appeal has been taken.

3. Whether a federal court has authority to enjoin a party from proceeding in state court, when the state court suit presents causes of action different from those asserted in federal litigation, and the state court proceedings name additional defendants not named in the federal proceedings.

4. Whether the trial court erred in completely sealing the court record and denying all public access to the trial throughout the entirety of the trial; and whether the trial court erred in denying the motion of NNOAC and Randy Lane to Intervene in the lawsuit to unseal the court record.